

### San Francisco Law Library

No. 76683

Presented by

#### EXTRACT FROM BY-LAWS

Section 9. No book shall, at any time, be taken from the Library Room to any other place than to some court room of a Court of Record, State or Federal, in the City of San Francisco, or to the Chambers of a Judge of such Court of Record, and then only upon the accountable receipt of some person entitled to the use of the Library. Every such book so taken from the Library, shall be returned on the same day, and in default of such return the party taking the same shall be suspended from all use and privileges of the Library until the return of the book or full compensation is made therefor to the satisfaction of the Trustees.

Sec. 11. No books shall have the leaves folded down. or be marked, dog-eared, or otherwise soiled, defaced or injured. Any party violating this provision, shall be liable to pay a sum not exceeding the value of the book, or to replace the volume by a new one, at the discretion of the Trustees or Executive Committee, and shall be liable to be suspended from all use of the Library till any order of the Trustees or Executive Committee in the premises shall be fully complied with to the satisfaction of such Trustees or Executive Committee.





## United States 1133 Circuit Court of Appeals

For the Ninth Circuit.

# Apostles on Appeal.

(IN TWO VOLUMES.)

CLINTON J. HUTCHINS,

Appellant,

VS.

AMERICAN STEAMSHIP "GREAT NORTH-ERN," Her Engines, Boilers, Tackle, Apparel, Boats, Furniture and Appurtenances, and A. AHMAN, Master, Bailee and Claimant Thereof, and THE GREAT NORTHERN PACIFIC STEAMSHIP COMPANY, a Corporation, Owners Thereof,

Appellees.

VOLUME II. (Pages 385 to 711, Inclusive.)

Upon Appeal from the United States District Court for the District and Territory of Hawaii.

Kilmer Bros. Co. Print, 230 Jackson St., S. F., Cai. 2 1 1918



### United States

### Circuit Court of Appeals

Far the Ninth Circuit.

## Apostles on Appeal.

(IN TWO VOLUMES.)

CLINTON J. HUTCHINS,

Appellant,

VS.

AMERICAN STEAMSHIP "GREAT NORTH-ERN," Her Engines, Boilers, Tackle, Apparel, Boats, Furniture and Appurtenances, and A. AHMAN, Master, Bailee and Claimant Thereof, and THE GREAT NORTHERN PACIFIC STEAMSHIP COMPANY, a Corporation, Owners Thereof,

Appellees.

VOLUME II. (Pages 385 to 711, Inclusive.)

Upon Appeal from the United States District Court for the District and Territory of Hawaii.

- Q. How long would it have taken to have immobilized Mr. Hutchins' arm?
  - A. About a half an hour.
- Q. About a half an hour, but I suppose you were hungry and wanted to get your breakfast, Doctor, that's natural. A. Probably.
- Q. Yes, and how long did you remain in Mr. Hutchins' room after you came back?
  - A. That I cannot answer definitely.
- Q. No, you say probably you were hungry, were you? Can't you remember?
- A. I can't remember my breakfast back so far. Naturally I eat breakfast every morning.
- Q. How long did you remain after you came back from that call, from that woman you say was in a dying condition,—you only went away and was gone about five minutes. When you came back can't you give us some idea how long you stayed with Mr. Hutchins?
- A. It must have been in the neighborhood of five minutes, maybe a little bit longer.
- Q. Yes, what time was it that you administered to Mr. Hutchins [378] this grain of cocaine?
  - A. Shortly after getting him in bed.
- Q. Shortly after getting him in bed, and he wasn't in bed more than ten minutes until you was back there? A. About that time.
- Q. Yes, and by having administered this grain of cocaine wasn't it advisable— A. Codeine.
  - Q. Codeine, all right; I thought you said cocaine.
  - A. Codeine.

- Q. All right; having administered this codeine,—that is a sort of an anesthetic, ain't it?
- A. It is an analgesic; it doesn't numb the senses but eases the pain.
  - Q. Yes, it deadens the pain? A. Yes.
  - Q. Just like an anesthetic, ether or any other--
  - A. No, sir.
- Q. No, but it's administered for that purpose; it may not be as strong, but it is administered for the purpose of deadening pain, isn't it?
  - A. That's true.
- Q. And now, having administered that, wouldn't it have been advisable for you to have made a closer examination and manipulated that arm some to ascertain whether there was a fracture there or not?
- A. The amount of codeine that I gave him would not in any way have relieved the pain that would be incident to manipulating the joint that was injured, like Mr. Hutchins'.
- Q. Was there any other doctors on board the "Great Northern" at that particular time, on that day, that voyage? [379] A. I don't know.
  - Q. You didn't make any inquiry to find out, eh?
  - A. No.
- Q. How many times have you administered an anesthetic on the "Great Northern" in the year you were employed there? A. Never.
  - Q. Never administered an anesthetic?
  - A. I have had it administered.
  - Q. You had an assistant, then?
  - A. Somebody helped me; I didn't help them.

- Q. Who assisted you in administering the anesthetic when you did?
  - A. I haven't any recollection.
  - Q. Wasn't it one of the stewardesses?
- A. I never had a layman administer an anesthetic on a ship.
- Q. I know, but you always superintend the administration of that anesthetic, don't you?
- A. When I do the administering. I took no part in the case. It was another surgeon who did it; I wasn't bothering my head about that.
- Q. I see. It was not necessary at all to administer an anesthetic to manipulate that arm and ascertain whether or not there was a fracture there?
  - A. It would be done without an anesthetic.
- Q. Sure, it could be done without an anesthetic, and from the examination that you made there,—how long was you examining Mr. Hutchins' arm after you got him in bed?
- A. I didn't examine him at all when we put him in bed.
  - Q. Examined him before you put him in bed?
- A. Only so far as looking at his condition in order to get [380] him under favorable surroundings, in his room first.
- Q. And when you got him under favorable surroundings how long did you take in examining him?
- A. I made the remark a little while ago that I was in his room in the neighborhood of five minutes. Between five and ten minutes I came back and found him being dressed by his wife.

Q. Then you didn't examine him any further than just to look at it?

A. Oh, no. I took the arm in my hand and went over certain—

Mr. DAVIS.—That is not in answer to the question.

The COURT.—Continue your answer.

A. I took Mr. Hutchins' arm in my hand and went through the symptoms already cited in order to find a grating of broken ends. I did not want at the time to put him to any more suffering than was absolutely necessary to satisfy my mind that by leaving him as I did the rest of the voyage that he would suffer no injury in consequence, for I had detected at the time that—

Mr. DAVIS.—That is not an answer—

The COURT.—He is answering the question, Mr. Davis. Don't interrupt, please.

Mr. DAVIS.—I didn't ask him that; he is going on to describe it. Haven't I got a right to have an answer to my question. I asked him how long he was doing that; that's all.

The COURT.—I think you are mistaken.

Mr. DAVIS.—No. Please read the question, Mr. Reporter; I know what I asked.

The COURT.—Now, Mr. Davis, this witness is entitled to answer the question. Read the question. [381]

(Last question read. Last answer read.)

Mr. WARREN.—I submit it is responsive all the way through.

The COURT.—The answer is legitimate and proper, and he is entitled to answer.

Mr. WARREN.—I want the witness to continue his answer.

The COURT.—He has told you what he did. Read the question again and let him answer it.

(Last question read.)

A. If I had detected at the time that there had been more prominent marked symptoms I would have immobilized—

Mr. DAVIS.—I didn't ask him what he would have done your Honor, it is not fair to put that stuff in on cross-examination.

The COURT.—But you asked the witness, or attempted to get the witness to answer that he didn't do a thing for the man.

Mr. DAVIS.—All right; I'll come back at him again.

The COURT.—He asked you what did you do, Doctor, do not state what you would have done. He objects to that as not being responsive to the question. Have you told all that you did, of what examination you made?

A. I suppose I ought to repeat that.

The COURT.—Never mind that; the question is answered. Go ahead.

Mr. DAVIS.—How long were you doing that?

A. In minutes I cannot answer that question definitely.

Q. Was you five minutes?

A. I think I was.

- Q. Was you more than seven minutes?
- A. That I cannot answer; it is absolutely impossible for me to tell you definitely how many minutes—
- Q. Tell us as near as you can, were you ten minutes? [382]
- A. I made the statement that it was somewhere between five and ten minutes.
- Q. Exactly, and it was nearer five minutes than ten minutes, wasn't it?
  - A. I don't know; I can't tell you that.
- Q. At all events, you didn't attempt to immobilize the arm? A. No.
- Q. Isn't it true that the only treatment, medical or surgical, that you gave Mr. Hutchins was that manipulation you described, and administered this grain of codeine, isn't that all you done?
- A. In addition, I advised carrying the arm in a sling.
- Q. Never mind the advice; isn't that all you actually did?
- A. I think my advice as to carrying the arm in a sling and subsequently seeing it carried out might be considered all the treatment. We don't stay around a patient and do all of these things; we delegate a nurse or a friend or somebody—
- Q. I want to know what you done outside of administering that advice; that's all you did do?
  - A. By my own hands.
- Q. Did you make the sling and put his arm in it or did you ask anybody else to do it for you?

- A. No, I didn't make the sling.
- Q. No; nor did you ask anybody else, any of the stewards or stewardesses on board, to make it?
  - A. No.
  - Q. Did you report the accident to the captain?
  - A. I did.
  - Q. Eh? A. I did. [383]
  - Q. Did the captain go to see Mr. Hutchins?
  - A. I don't know.
- Q. When did you make the report to Captain Ahman?
  - A. I don't know definitely the date.
  - Q. Eh?
- A. I don't know the definite time I made the report.
- Q. You don't know the definite time? Who was present when you made this report?
- A. That I cannot say; the captain was in his room when I had occasion to see him.
  - Q. Was the report verbal or written?
  - A. Verbal.
  - Q. When was it, on the same day?
  - A. There is a written report of all accidents—
- Q. Well, I am asking you, did you make a report of the thing on the day it occurred, to the captain of the vessel, did you make an oral report that day, on the 18th of February, to the master of that steamship about this accident? A. I think I did.
  - Q. Will you swear you did?
- A. I cannot swear definitely to the time I did make that report, no.

- Q. Have you ever been in that shower-bath your-self? A. Never have.
- Q. No, you never was in that particular shower-bath yourself? A. No.
- Q. But you came in there and saw Mr. Hutchins sitting on a stool, eh, and suffering pain?
  - A. Yes.
- Q. Yes, and of course you was doing as every doctor does, you was trying to do the best you could to get him removed [384] away and your attention fixed on him? A. Yes.
  - Q. Is that true? A. Yes.
- Q. Yes, then will you undertake to swear now that you saw that handle in the back of that bath-tub on that morning, while you were thus engaged?
  - A. No.
  - Q. You won't? A. No.
- Q. Well, then, when you told Mr. Warren that the handle was there you might be mistaken about it?
  - A. It was there when I examined the bath.
- Q. I know, but I am asking you—how long afterwards? A. I examined it that day.
  - Q. What time? A. I don't know.
  - Q. Eh? A. I don't know.
  - Q. Who was with you? A. Nobody.
  - Q. What did you examine it for, for what reason?
- A. To see if there was any way in there by which he could have supported himself. I have a custom, I might say, of looking into these things that might be for the well being of passengers, we frequently report things of that character.

Q. How long was you making that examination, Doctor?

A. Just a matter of a glance, that was all that was necessary.

Q. Eh?

A. A glance was all that was necessary.

Q. I am asking you what you did,—did you just glance?

A. I went in and looked at the tub—compartment.

Q. Did you go in and examine it or did you glance at it? I don't care which way you put it, you talk about glancing,—was it a glance or an examination?

[385] A. Well, it was an examination.

Q. Then that glance, when you said glanced, you are mistaken about that, you wish to qualify that, do you, you wish to qualify that?

A. Well, I don't think so; no. Some people by glancing can take in a good deal.

Q. All right, then, it was just a glance. You stand by that statement that it was just a glance, do you? A. I think so; yes.

Q. All right. Now, outside of administering this grain of codeine, did you give Mr. Hutchins any more medicines on that voyage after that accident?

A. No.

Q. No, and you didn't make any sling or cause any sling to be made for his arm? A. No.

Q. No, and you didn't undertake to immobilize his arm? A. No.

Q. Then all you did was simply—you heard a grating sound there, didn't you, when you were manipu-

(Testimony of Dr. Robert J. McAdory.) lating it,—you said you heard a grating sound?

A. I heard a grating of the sesamoid bones around the front of the glenoid, that I could not definitely state it was that particular bone, but it did not give the same grating sound that a crepitus would, broken, jagged ends.

Q. Now, you are talking about crepituses, all right. Wasn't that enough to cause a scientific practitioner to immediately immobilize the arm as a matter of precaution and safety?

A. Not the fact that you hear the little bones around there [386] clicking, no.

Q. They never do, never immobilize it after hearing them clicking or grating?

A. No, not those bones. If you sling your arm around this way you will get that.

Q. You know he is a heavy man? A. Yes.

Q. Didn't he tell you that he fell out of the bathtub on his left shoulder? A. Yes.

Q. You saw him sitting on that stool gasping and suffering pain, did you? A. Yes.

Q. Now, wasn't that enough to arouse your suspicions that there might be a fracture there, that you ought to immobilize it?

A. It aroused my suspicions to recommend him as soon as he arrived in Honolulu to seek advice on that particular point.

Q. Outside of the advice on that particular point, wasn't it your duty as a surgeon to immediately immobilize that arm as a matter of precaution and safety?

A. It was my opinion after examining Mr. Hutchins that there would be no danger in his carrying his arm in a sling for the remainder of the voyage.

Q. I didn't ask you that; I asked you if it wasn't your duty as a physician to immobilize that arm; that is what I asked you, answer yes or no.

A. My duty to a patient is the result of my judgment—

Q. Yes, and—

A.—and in my judgment I did what I did in that particular case. [387]

Q. I know you did what you did, but wasn't it, as a scientific practitioner, wasn't it the proper thing to do to immobilize that arm in view of what took place and in view of your examination?

A. Not under the conditions; no.

Q. Then if Doctor Wood testified that it was proper to do that then his testimony is worthless?

A. I don't know anything about his testimony.

Q. And if Doctor Straub did so testify, then his opinion is not worth anything in your judgment; is that so?

Mr. WARREN.—I object to the question that it certainly does not give the witness any comprehension of the conditions which were known to Doctor Wood when he made the examination.

Mr. DAVIS.—Here is a man who was on the ground, and who knew all about it.

The COURT.—He can't give his opinion on anyone else's testimony.

Mr. DAVIS.-Now, I will ask you, then, if Doctor

Hobdy testified after having received a statement from Mr. Hutchins as to the accident, as to how it happened and after having made an examination if he testified that it would have been skillful and scientific treatment to have immobilized that arm, is Doctor Hobdy wrong in your opinion and judgment?

Mr. WARREN.—I make the same objection on the same ground.

Mr. DAVIS.—I submit the question is proper.

The COURT.—Sustain the objection. You cannot ask this man his opinion on somebody else's testimony.

Mr. DAVIS.—To which I respectfully except, and assign the same as error. [388]

The COURT.—Exception allowed.

Mr. DAVIS.—Now, was the treatment which you gave this patient on board this vessel scientific and skilful treatment in your own opinion?

A. It was.

- Q. What you have described, what you done, was that all you think you was required to do to give this man skilful surgical treatment? A. Absolutely.
  - Q. Absolutely, that is your opinion of it, is it?

A. Absolutely.

- Q. Ha-ha! And then you gave him a grain of codeine; that's all you done?
  - A. That is all the medicine I gave him.
  - Q. Yes, but you didn't bandage his arm?

Mr. WARREN.—I object to the question as asked and answered.

Mr. DAVIS.—You didn't cause it to be bandaged?

- A. No.
- Q. You only saw him once in his stateroom, isn't that true?
  - A. I saw him a great many times after the injury.
  - Q. In his stateroom?
- A. Passengers do not stay in their staterooms very much; they stay on deck. It is too warm in the staterooms.
- Q. Did you go to his stateroom after you visited him that morning?
- A. It wasn't necessary; I saw him on deck very frequently.
- Q. I didn't ask you that; I asked you if you went to his room. A. No.
- Q. Do you know whether the master of the vessel went? A. No. [389]
  - Q. You was present at this mock trial?
  - A. Yes.
- Q. Mr. Hutchins' back was turned to you, wasn't it? A. No.
  - Q. He was facing you, was he? A. Yes.
  - Q. You are sure of that? A. Absolutely.
- Q. I suppose you went in that shower-bath compartment and took hold of that handle that was on the back of the bath, did you, Doctor?
  - A. I did not.
- Q. And you didn't pay any particular attention to the handle; you just went in and glanced at it, as you state, isn't that all? A. Yes.
  - Q. Where did you graduate, what college of physi-

(Testimony of Dr. Robert J. McAdory.) cians and surgeons did you graduate from, Doctor McAdory?

- A. The University of the City of New York.
- Q. Yes; that's a good college, too. I suppose this other patient that was sick on board,—did she die or not? A. No.
- Q. Did you advise Mr. Hutchins to go to any—to some physician in Hilo to examine into that fracture?
- A. When I suggested on getting into Honolulu to see somebody he said he would see his friend, Doctor Wood—
- Q. I didn't ask you that; I asked you if you suggested going to anybody in Hilo? A. No.
- Q. How long were you in Hilo, Doctor, the ship, on that voyage?
- A. We arrived there in the morning and left at midnight.
- Q. Where were you from morning to midnight, did you stay on [390] the vessel? A. No.
  - Q. Where did you go—to the Volcano House?
  - A. That I do not recollect.
  - Q. Eh? A. I don't recollect.
  - Q. Well, didn't you go to the Volcano House?
- A. I don't know; I made several trips up there. We made seven trips and I was up to the volcano five times; whether this was one of them or not I don't remember.
- Q. On this particular trip in February, as a matter of fact, didn't you go to the volcano?
  - A. I told you I don't remember.

- Q. Then your memory must be very very poor if you don't remember having seen that volcano in February, eh?
- A. I may have seen it in February, probably I went up there; we made seven trips down there, seven trips here.
  - Q. I don't care if you made five hundred trips.
- A. I don't remember whether it was one of those trips which he was here or not.
- Q. He was injured on the 18th of February, 1916; it was the February trip; do you remember whether you went to the Volcano House on the arrival of the vessel at Hilo?
  - A. I replied that I do not remember.
  - Q. But you might have gone up, eh?
  - A. Very likely.
  - Q. More than likely you did go up?
- A. Two times I didn't go up, but which of these two it was I don't remember.
- Q. When the vessel arrived in Hilo on that particular trip, the vessel arrived on the 20th, the accident happened on the 18th, that was two days, did you inquire after the [391] vessel arrived from Mr. Hutchins, in what condition his arm was?
- A. I made the statement that I spoke to Mr. Hutchins every day while he was on the boat; we passed each other frequently.
- Q. Did you ask him about his condition, whether he was suffering any pain when the vessel arrived at the port of Hilo on the 20th of February, 1916?
  - A. That I do not recall.

- Q. No, and did you tell him or make any proposition to go to any physician in Hilo with him?
- A. I did not, because of his having mentioned his friend, Doctor Wood.
- Q. I don't care what the reason was, you didn't do it, that's what I am asking you, you didn't do that, you didn't suggest to him to go to a physician?
  - A. No.
  - Q. No? A. Not in Hilo.
- Q. And you was—you arrived there about eight o'clock in the morning in Hilo?
  - A. About that time.
  - Q. Eh? A. About that time.
- Q. And you didn't leave until midnight; when did the vessel arrive in Honolulu, do you know?
  - A. About ten in the morning.
  - Q. On the 21st, wasn't it?
  - A. I don't remember the dates.
  - Q. You don't remember? A. No.
- Q. Wasn't it three days after the accident happened instead of two days that the vessel arrived in Honolulu? [392]

Mr. WARREN.—I object to that, your Honor; the testimony has been two days to Hilo, not two days to Honolulu.

Mr. DAVIS.—I am talking about three days.

Mr. WARREN.—I object to the question and ask for a ruling as stated.

A. I can't answer you-pardon me.

Mr. DAVIS.—The accident happened on the 18th, and the vessel arrived at Hilo on the 20th and ar-

rived at Honolulu on the 21st, and I have the right to ask him about it. That's three days instead of two days before he got to Honolulu that he had to keep up this suffering, it makes considerable difference.

The COURT.—Did the witness say it was only two days?

Mr. WARREN.—I will withdraw the objection and let the witness answer the question, he can take care of himself.

Mr. DAVIS.—Well, it was three days his arm was in that condition, wasn't it, and as far as you are concerned outside of the administration of that grain of codine you done nothing from the time of the accident until the vessel arrived in Honolulu, did nothing further in the way of treating Mr. Hutchins except to advise him?

Mr. WARREN.—I object to the question; it has been asked and answered several times.

Mr. DAVIS.—I don't think so.

The COURT.—Sustain the objection; he has told at least a half a dozen times what he did.

Mr. DAVIS.—I respectfully except.

Q. After the vessel arrived in Honolulu you didn't treat Mr. Hutchins in any way?

A. No. [393]

Q. You would have no trouble administering an anesthetic or getting the assistance of any doctor on board if you wanted it in a case of necessity, would you, Doctor McAdory? A. No.

Q. How many surgical operations have you per-

(Testimony of Dr. Robert J. McAdory.) formed, Doctor, within the last five years?

- A. I could no more answer that question than fly. I would have to look up a lot of records to answer that question.
  - Q. Well, have you performed a good many?
  - A. Yes.
  - Q. Where?
  - A. At places where I have been located.
- Q. I mean where,—for instance, have you performed any on the "Great Northern"?
- A. I never performed an operation on the "Great Northern."
- Q. Did you ever immobilize a broken arm on board of her?
  - A. Never had any broken arms to immobilize.
  - Q. I am asking you if you had, or did not.
- A. I wish to retract the statement there in regard to the operations there. I was thinking when you asked the question relative to knife operations, but I will have to state that there were a number of accidents of a minor surgical nature on the ship, such as a dislocated shoulder, a fractured rib—
- Q. Have you ever immobilized anybody on the "Great Northern"?
  - A. I immobilized a dislocated shoulder.
  - Q. Yes, you did do that, eh? A. Yes.
  - Q. Why didn't you do that to Mr. Hutchins?
  - A. I thought I told you that.
- Q. If it was a bruise wouldn't it be safe to do it—
  [394]
  - A. Mr. Hutchins was able to carry his arm in a

sling without any great amount of motion. He arrived at the same result without strapping it up in the usual way that fractures are treated, up close to his body; in fact, the results would be better if it was a bruise to sling the arm to let the circulation be free rather than strap it around with adhesive straps.

- Q. If it was only a bruise wouldn't it be all right to do that?
- A. It wouldn't be the best line of treatment, absolutely not.
  - Q. Would it subject the patient to any injury?
  - A. No injury; no.
- Q. Therefore you could have done it with perfect safety?
- A. Could have done it with perfect safety, yes, with the exception of the possibility of exceriations of the skin which would have caused some physical discomfort.
- Q. No suspicion in your mind at the time you made that examination that there was a fracture of that shoulder or arm?
  - A. There was a suspicion in my mind, yes.
  - Q. Why didn't you immobilize it then?
- A. The symptoms that I could elicit were not sufficient to clear the matter up in my mind.
- Q. Still you had a suspicion and wanted to be absolutely sure on that point?
- A. I wanted to be absolutely sure in order to give Mr. Hutchins everything possible.
- Q. But you had a strong suspicion that his arm was broken?

A. No, if I had had a strong suspicion that that arm was broken I would have immediately immobilized it.

Q. How far did your suspicion go? You said you had some [395] suspicion.

A. A man of Mr. Hutchins' size where his shoulder is large, it is very difficult to make a definite diagnosis—

Q. I didn't ask you that. I asked you to what extent your suspicions went, was it slight or great?

A. It was slight.

Q. A slight suspicion, not enough to cause you to even bind the arm up, eh?

A. If I had a great suspicion I would have immobilized it.

Q. I see, but you had a suspicion?

A. I had a slight suspicion to this effect that as I stated before I had not given—I did not subject Mr. Hutchins to all the physical discomfort that would have been necessary to become more definitely satisfied as to the real condition of the shoulder, and even if I had I would have subsequently had him undergo an X-ray, because these fractures in persons of his size, and even thinner persons are very difficult to make. That is, as I stated before, the opinion of great surgeons, such for example as Professor Stimson.

Q. Never mind about the professor. Immobilizing the arm, eh, that is, a suspicion enters the mind of a physician that it is broken, it is a small operation, isn't it, a small performance?

- A. Not a simple performance.
- Q. But to immobilize an arm is a very simple thing to do? A. A very difficult thing to do.
  - Q. Very difficult to put cotton around it?
- A. That is not immobilizing it. The bones must be set the way they are, and then immobilize that joint so that they [396] will set that way. It is a very difficult proposition, especially in the humerus, which has such a wide latitude of motion; it is one of the most difficult parts of the body to immobilize.
- Q. It would take you a half an hour to do it, you say? A. About a half an hour; yes.
- Q. You could have bound up the arm; that would have been simple enough. A. Yes.
  - Q. You didn't even do that, Doctor? A. No.

Mr. DAVIS.—That's all.

Mr. WARREN.—Nothing further.

The COURT.—We will continue this case until Thursday morning at 10 o'clock.

The court then adjourned to meet at 10 A. M., Thursday, March 1, 1917. [397]

In the United States District Court, in and for the Territory of Hawaii.

#### CLINTON JAMES HUTCHINS,

Libellant,

VS.

The American Steamship "GREAT NORTHERN," etc.

Honolulu, H. T., Thursday, March 1, 1917.

#### Testimony of John Waterhouse, for Libelees.

Direct examination of JOHN WATERHOUSE, for libellees, sworn.

Mr. WARREN.—You are the treasurer of Alexander & Baldwin, Limited, Mr. Waterhouse?

A. I am.

Q. I will ask you whether or not between the 21st of February and the 5th of April, 1916, there were any negotiations between Mr. C. J. Hutchins and Alexander & Baldwin, Limited, relative to the purchase of molasses, and if so, when in that period.

A. No actual negotiations. I mean it takes two to make a bargain. I will state this, that Mr. Hutchins came into the office a number of times and was very anxious to [398] see Mr. J. P. Cooke, who is the manager of Alexander & Baldwin, about purchasing molasses of our firm, especially the molasses of our plantations for which we act as agents, especially the McBryde Sugar Company and the Hawaiian Sugar Company,—

Mr. DAVIS.—Wait, I object, we submit this is incompetent, irrelevant and immaterial for any purpose, not tending to prove or disprove any of the issues in this case, and has nothing at all to do with it. Mr. Hutchins' private business has nothing to do with this case, and I don't know for what purpose this evidence is offered. It is beyond my conception why he drags into this case things which are not connected with the case in any way I can see.

The COURT.—Mr. Davis, one of the elements of damages is that the libellant was prevented from attending to his business, as I understand it; is that correct?

Mr. WARREN.—That is it, your Honor.

The COURT.—The extent of this testimony is that he was about and attending to business at that time?

Mr. WARREN.—Yes, and further, your Honor, that he was here and engaged in and transacted business.

The COURT.—I don't care about the nature of it. Mr. WARREN.—I do. I propose to show that he was down here at that time, remaining here at that time voluntarily conducting negotiations with sugar agents here when he could have returned, and that he voluntarily remained here and did business here, and was not damaged as he claims by having been obliged to remain here against his will and being kept away from his business in San Francisco; [399] in other words, he voluntarily remained here, and not kept here by the accident.

Mr. DAVIS.—I submit it is incompetent. Your Honor has ruled that the nature of the business is not to be put in evidence here. The fact that he had business or no business might properly be put in here as an element of the damages, but to go into the nature and extent of that business, he has not any right to do it. I don't know what the matter is with him.

The COURT.—As a matter of fact, I do think it is immaterial to go into his private business, but at the same time the fact that he was attending to busi-

ness, and in a general way of the details of it, not for the purpose of unnecessarily disclosing his business,—I will permit the testimony.

Mr. WARREN.—One of the purposes it will be recalled, he testified his business was buying and selling molasses so that I want to show he was not only here but in that identical business of his own—

The COURT.—And trying to make a deal with regard to molasses, of course in a general way that is all right. I will not allow his private business to be inquired into.

A. What is the question?

Mr. WARREN.—I will put another to save time. Can you recall and state to the Court approximately the dates or time when Mr. Hutchins came to the office of Alexander & Baldwin, Limited, on this business?

- A. Some time during the month of March, 1916, several times during the month of March, 1916. The last time I saw him about the office I met him on Merchant street and he said [400] he had been several times to see Mr. J. P. Cooke, the manager of Alexander & Baldwin but was unable to see Mr. Cooke, and I suggested that the best way for him to do was to put the matter in a letter to Mr. Cooke and that Mr. Cooke could look over it at his leisure. He did so.
  - Q. Have you that letter, Mr. Waterhouse?
  - A. I have, also Mr. Cooke's reply.
- Q. Produce it. Do you recall how soon after that conversation it was that the letter was written?

A. It was either a day or two days, I think.

Q. After? A. After.

The COURT.—Show the letters to counsel.

Mr. DAVIS.—I submit, your Honor, this is going into private business and details by the introduction of these letters. It is incompetent, irrelevant and immaterial. For the purpose of showing that he had general business, all right, but this letter is going into all of the details of the business. I would like your Honor to have a look at it.

Mr. WARREN.—If your Honor please, for the purpose of fixing the time to which the witness has referred and the nature of the business, but not the details, I desire to offer this letter. If counsel will stipulate, the letter is dated,—stipulate as to the date of the letter and his soliciting the purchase of molasses I am willing to withdraw the letter.

Mr. DAVIS.—That is all right.

The COURT.—I think it is legitimate for this purpose.

Mr. WARREN.—That is all I care to show about that.

- Q. Now, Mr. Waterhouse, this letter was written one or two days after you made that suggestion to Mr. Hutchins? [401] A. Yes.
- Q. About how many times did Mr. Hutchins go into Alexander & Baldwin, Limited, to see you upon this business before he wrote the letter?

A. He was in two or three times as far as my knowledge is concerned.

Q. How many times afterwards?

A. I don't think he came in afterwards; I saw him on the street about it.

Q. Do you know whether the negotiations continued or terminated?

A. I think they were terminated by that letter, the reply.

Q. By the reply given by Alexander & Baldwin to Mr. Hutchins? A. Yes, by Mr. Cooke.

Mr. WARREN.—It will be admitted that by letter dated the 22d of March negotiations were discontinued? Letter from Alexander and Baldwin to Mr. Hutchins?

Mr. DAVIS.—All right.

The COURT.—It is admissible for that purpose.

Mr. WARREN.—I think it will be admitted they were both witnesses in Honolulu?

Mr. DAVIS.—Yes, and both typewritten, and Mr. Hutchins did not read it.

Mr. WARREN.—Then I will ask if counsel will admit that this is Mr. Hutchins' signature?

Mr. HUTCHINS.—Yes, that is my signature.

Mr. WARREN.—Both letters being dated and written in Honolulu. That's all. [402]

Cross-examination of JOHN WATERHOUSE.

Mr. DAVIS.—You know Mr. Hutchins very well, eh? A. What is that?

Q. You know Mr. Hutchins very well?

A. I do.

Q. Are you connected with the—you are one of the leading men in the sugar industry here, connected with the plantations, Mr. Waterhouse?

- A. Well, I am.
- Q. How long have you been engaged in it?
- A. Since 1901.
- Q. Did you see Mr. Hutchins,—did he have his arm in a sling when he came in?
- A. He did, in a black silk handkerchief, sir, as I remember.
- Q. Now these two letters are typewritten letters, both Mr. Hutchins' letter and your reply?
  - A. Yes.
  - Q. Written evidently by a stenographer and typist?
  - A. I presume so.
  - Q. Yours was, anyway? A. Ours was anyway.
  - Q. The other one seems typewritten?
  - A. Yes; it's typewritten.
- Q. Now, how many times did Mr. Hutchins call on you in March, do you know?
- A. I saw him personally, I think, two or three times; I think at least three times.
  - Q. You saw him two or three times?
  - A. Yes, at least three times.
  - Q. Each time he had his arm in a sling? [403]
  - A. If my memory serves me right, he did.
  - Mr. DAVIS.—That's all.
  - Mr. WARREN.—That's all.
- The COURT.—Step aside, Mr. Waterhouse. [404]

#### Testimony of J. W. Waldron, for Libelees.

Direct examination of J. W. WALDRON, for libellees, sworn.

Mr. WARREN.—Mr. Waldron, you are the treasurer of F. A. Schaefer and Company, Limited?

A. Beg pardon?

- Q. You are the treasurer of F. A. Schaefer and Company, Limited? A. Yes.
- Q. And also an officer of the Honokaa Sugar Company and the Pacific Sugar Mill?
  - A. Yes, secretary.
- Q. Did you in the period between the 21st of February and the 5th of April, 1916—

Mr. DAVIS.—Can I ask a question without interrupting? When you are through we will call Doctor Wood for more testimony.

Mr. WARREN.—Did you get the question, Mr. Waldron?

A. No.

- Q. Whether between those two dates, the 21st of February and the 5th of April, 1916, you had any negotiations with Mr. C. J. Hutchins, relative to the purchase of molasses? A. Yes, I did.
  - Q. When did those commence.

A. I cannot say when they commenced. Since being subpoenaed I have looked up the matter of the first letter that is on record, and that is the 28th of March.

- Q. Of what year? A. 1916.
- Q. Received by F. A. Schaefer & Company, Lim-

(Testimony of J. W. Waldron.)

ited, from Mr. Hutchins?

- A. Yes, received by F. A. Schaefer and Company from Mr. Hutchins. [405]
- Q. The 28th of March; now, prior to that date, did you have any conversation with Mr. Hutchins about that?
  - A. I believe I did, but it is some time ago now.
- Q. To the best of your recollection the negotiations took their first concrete shape when this letter was submitted?
  - A. That is my recollection, yes.
- Q. Those negotiations were subsequently carried on with Mr. Hutchins? A. They were, yes.
- Q. And will you state whether they resulted in a contract or terminated?
- A. Yes, a contract,—they resulted in a contract being signed on the 12th of July in Honolulu, and later in San Francisco.
- Q. Would you mind stating molasses from what plantations?
- A. Molasses of the Honokaa Sugar Company and the Pacific Sugar Mill.

Cross-examination of J. W. WALDRON.

- Mr. DAVIS.—Are those letters typewritten or in pen and ink?
- A. The letter from Mr. Hutchins dated the 28th of March is typewritten.
- Q. Did you notice whether Mr. Hutchins had his arm in a sling at that time?
- A. Yes, I remember that Mr. Hutchins did have his arm in a sling.

Mr. DAVIS.—I guess that's all.

Mr. WARREN.—Will counsel admit that this is Mr. Hutchins'? [406]

Mr. DAVIS.—Yes. I want to make a motion, so that the record will be straight, I move to strike the evidence of both Mr. John Waterhouse and J. W. Waldron, to strike the testimony entirely out on the grounds that it is incompetent, irrelevant and immaterial, not tending to prove or disprove any of the issues in this case and not connected in any way with the breach of this marine contract and no justification for the breach of same, and not admissible, and improper testimony.

Mr. WARREN.—I submit this comes in as affecting the question of damages.

The COURT.—I deny the motion.

Mr. DAVIS.—To which ruling I respectfully except.

The COURT.—Exception allowed.

Mr. WARREN.—It will save time and delay if counsel will admit, will make this admission, that Mr. T. H. Petrie, Secretary of Castle & Cooke, Limited, and the Kohala Sugar Company, if called to the stand and sworn, would testify that negotiations for the purchase of molasses were opened between Mr. Hutchins and Castle & Cooke.

Mr. DAVIS.—What date?

Mr. WARREN.—In the last two or three days of March and the first two or three days of April, 1916, which were subsequently further carried on by correspondence and resulted in the execution of a con-

tract for the sale of molasses of the Kohala Sugar Company to Mr. Hutchins.

Mr. DAVIS.—Will that close the case then?

Mr. WARREN.—Yes, that will close the case for a time.

Mr. DAVIS.—All right. [407]

Mr. DAVIS.—We want to call Doctor Wood in rebuttal of Doctor McAdory's testimony.

# Testimony of Dr. C. B. Wood, for Libelant (Recalled in Rebuttal).

Direct examination of Dr. C. B. WOOD, for libellant, recalled.

Mr. DAVIS.—Now, Doctor Wood, Doctor Mc-Adory was on the stand—when was it, yesterday—day before yesterday; this is Thursday; that would be on Tuesday—

The COURT.—That is immaterial ask him hypothetically.

Mr. DAVIS.—He was a witness, and you can get the reporter's notes read.

The COURT.—It is immaterial what Doctor Mc-Adory testified; you put your hypothetical question to Doctor Wood, because he couldn't give an opinion on Doctor Wood's testimony but he can give his professional opinion on the hypothetical question propounded.

Mr. DAVIS.—All right. A passenger on the "Great Northern," to wit, Mr. C. J. Hutchins, having his arm broken in the manner described in testimony in this case, and going to a surgeon for medi-

cal and surgical relief and treatment in order to ascertain whether or not he had a broken arm, would it be necessary to administer an anesthetic?

Mr. WARREN.—I object to the question. It does not state the facts and circumstances which should be included in the question. This witness has been present in court, he has not heard all the testimony in this case, and he can't assume to give an answer which describes a man's arm as being broken as testified in this case. [408]

The COURT.—Possibly there might be some objection on that line, but I understand that this witness testified he was familiar with the manner of Mr. Hutchins' injury. I understand the offer is to get practically at the question of whether or not a man injured as this witness knows or has learned Mr. Hutchins was injured, whether or not it was necessary in order to determine whether it was necessary—in order to determine whether there was a fracture, to put a man under an anesthetic.

Mr. DAVIS.—That is all I am asking.

The COURT.—Will you let me frame Mr. Davis' question to that effect?

Mr. WARREN.—He can frame it, your Honor.

The COURT.—All right, let him frame it.

Mr. DAVIS.—I will put the question as I put it before. Isn't that perfectly proper?

The COURT.—I overrule Mr. Warren's objection.

Answer the question as put.

Mr. WARREN.—I except and assign the same as error, your Honor.

A. It is a question, your Honor, that is impossible to answer yes or no. An anesthetic, to anesthetize a patient with a fracture, any fracture, is a help in determining the nature of the fracture and the extent of the fracture. It is a help for this reason, or for these reasons, that a patient who is recently fractured, who has a recent fracture, in attempting to move the fractured limb, to manipulate it, is painful. Because of the pain, the patient, either consciously or unconsciously, intentionally or unintentionally, resists the attempts to move the limb because it hurts, consequently an anesthetized [409] patient is not suffering pain, not being conscious of what is going on, not being able to bring his muscles into resistance against the manipulation is easier to examine, and as I stated in the first place it is an advantage in many instances to anesthetize a patient in examining a fracture or dislocation or other similar injury to a limb. Now, taking this special fracture which I understand, because I have examined it and seen the X-ray plates, I know that the arm, the shoulder-joint, the humerus, the arm going in at the shoulder-joint, was fractured; I know that a portion of it, which I will call the greater tuberosity, was splintered off; I know in addition to that that there was an impaction, a pushing up of the end of the two fragments, a pushing of the end of that into —impacting it into a similar fragment. Just how much additional information could be gained in this particular case by anesthetizing the patient is somewhat doubtful, because there was not any motion

there anyway between the fragments, there was not any great deformity, no misplacement of bone, so that a great deal of manipulation in a case of this kind would not throw much light on the subject, and it is perfectly well understood among surgeons knowing that a fracture is an impacted fracture, that it is bad policy to manipulate it very much, that is, if it was already known it was an impacted fracture, then it would be a mistake either under an anesthetic or not under an anesthetic, to manipulate that limb very much because you would run the risk of breaking the manipulation which would make the case more serious than it [410] was without this manipulation, without breaking up the impaction. The impaction is there, and the aim is to alleviate the impact if you know of the impaction. That is the best I can answer the question.

Mr. DAVIS.—How long did it take you to know there was a fracture there when you examined Mr. Hutchins?

A. Well, I didn't make a positive diagnosis of the fracture and of the nature of the fracture. My strong opinion was there was a fracture but I did not make a positive examination that there was a positive fracture and of the nature of that fracture until I saw the X-ray plate.

Q. But you were satisfied in your own mind and you immobilized his arm immediately?

A. I did that, and my opinion was that it was a fracture.

Q. And that was proper treatment?

- A. Certainly that was proper treatment.
- Q. Yes, certainly that was proper treatment, and there was no need of administering an anesthetic to treat the man in that *was*, was there?
- A. I believe the question is not the administration of an anesthetic. As far as the treatment of it was concerned there was no advantage in administering it anyway.
- Q. If that was the proper thing to do there was no need of administering an anesthetic, was there, to Mr. Hutchins, before you immobilized his arm?
- A. I did not consider it necessary to administer an anesthetic in making my examination, or I should have done so.
- Q. Exactly; that's fair, Doctor Wood; that's all I want to know. [411]
- Mr. DAVIS.—That is the case, if your Honor please, for the libellant, Mr. C. J. Hutchins. Cross-examine.

Cross-examination of Dr. C. B. WOOD.

- Mr. WARREN.—You have stated, Doctor, that in a case where the examining physician knows, as you do now, that there was an impacted fracture, then manipulation would not be advisable, and the more the manipulation the worse it might be for the patient?
- A. Well, I did not say manipulation was not advisable, but I stated that extensive manipulation is inadvisable, knowing there is a fracture.
- Q. And a doctor examining an injury of that character and finding no fracture apparently, and

being unable to determine what the real condition was, would be warranted in making some manipulation?

A. Certainly.

Q. And now I would ask you as to the time of manipulation. You have spoken of the pain which naturally attends manipulation. Is there any difference in that degree of pain in manipulating a member in the case of a heavy, thick-set man and a thinner person in this connection, that does it require more or less manipulation to arrive at a diagnosis in the case of an injured shoulder where outside conditions did not indicate what it was?

A. A thin man, a man who has not much muscle or fat over his bones, is an easier subject to diagnose a fracture [412] in, or a dislocation or any injury to or around a joint, because to some extent with the information you gain with your fingers in feeling the fracture, not having so much cushion between your fingers and the bone. As far as the manipulation is concerned, the information you gain by manipulation, I mean the movement of the injured limb as far as any information you can obtain by these movements irrespective of what you obtain by the use of your fingers over the joint, as far as any point in the two instances is concerned, I cannot see much difference.

Q. I mean more particularly in the length of time which you would have to keep on with your examination; in other words, you could conclude the examination with a thinner man sooner than with a heavy-set man?

American Steamship "Great Northern" et al. 421 (Testimony of Dr. C. B. Wood.)

A. Naturally you would get more information directly if there was less thick cushion.

Q. Now, Doctor, on the matter of whether or not it was the proper thing to immediately immobilize the arm, I would ask you if the circumstances were these, what would be your opinion, that is, an accident occurs to a passenger, an injury to his shoulder, it being difficult to determine just what the trouble is, whether there is or is not a fracture, crepitus as distinguished from impaction, the doctor being uncertain, the vessel being two days from the port of Hilo, where there are three at least practicing physicians and surgeons, would it in your judgment be incompetence or negligence of the surgeon on board to abstain from prolonged manipulation or to abstain from actually tying the member in a position [413] which in his opinion might be the wrong position, depending upon what the injury really is, if it is anticipated that within forty-eight hours the patient can consult a physician ashore and have a manipulation made and treatment given.

Mr. DAVIS.—I object unless he puts this in: The only thing the doctor did was to administer one grain or codeine, because that is the fact, without which it is not a proper statement of facts.

The COURT.—Overrule the objection. The question speaks for itself.

Mr. DAVIS.—To which ruling I respectfully except, that it is not a proper statement.

The COURT.—Allowed.

A. It is a long-winded question. My opinion is

that when a surgeon is called upon to diagnose and to treat an injury aboard a ship, however far that ship may be from port, whether there are skilled surgeons in the port they are approaching or whether there are no surgeons in that port, it is his duty, in my opinion, to do the best he knows how for the patient irrespective of the chance to consult anybody I cannot have any other opinion than that the surgeon should have ascertained not perhaps exactly what the injury was, but that there was an injury, and a painful and somewhat serious injury to the patient's shoulder-joint, and the treatment, the recognized treatment, in cases of that kind as to immobilizing the joint and prevent the pain from motion, voluntary or involuntary on the patient's part, [414] whether or not it can be determined the exact nature of that injury to the joint which should have been evident there was injured, and having an injury to the joint, that is the treatment that should have been carried out, anyway.

Mr. WARREN.—You have stated that it was a long-winded question; you mean by that a mooted question?

A. No, I mean it brought in several points, among others the fact that it was aboard ship and the length of time they were from port, and the fact that there were surgeons or doctors more or less skilled in that port, all those things concerning what should have been the duty of the one who had been called in to treat that case; that is the reason why I say it is

long-winded, not on account of the number of words in it.

Mr. WARREN.—No further questions.

Mr. DAVIS.—That's all; thank you, Doctor Wood. Call Mr. Hutchins to rebut the testimony of Doctor McAdory, that he advised him to have his arm in a sling and have an X-ray taken. [415]

# Testimony of Clinton James Hutchins, in His Own Behalf (Recalled in Rebuttal).

Direct examination of CLINTON JAMES HUT-CHINS, for libellant, in rebuttal, recalled.

Mr. DAVIS.—You were present in court and heard McAdory, M. D., give testimony?

A. I did.

Q. Was anything said to you by McAdory about putting the arm in a sling, if so, what was it?

A. He said nothing of the kind. It was,—he said it was a bad sprain and would be all right in a few days. I didn't put any sling on; I had a vest; I unbuttoned my vest and placed my arm in this position, holding it up all the time until we got to Honolulu.

- Q. Did he ever say anything to you about having the arm in a sling? A. He did not.
- Q. Did he say anything about having an X-ray picture taken?
- A. He did not; another doctor on board advised me.
  - Q. Another doctor? Who was he?

(Testimony of Clinton James Hutchins.)

- A. A passenger.
- Q. Do you know his name?
- A. I have forgotten his name; he is from Massachusetts.
- Q. McAdory didn't do anything except give you this one grain of codeine? A. He did not.

Mr. DAVIS.—Cross-examine.

Mr. WARREN.—No questions.

Mr. DAVIS.—That is all; that is the case, if your Honor please.

The COURT.—Adjourn court until to-morrow morning. [416]

In the United States District Court, in and for the Territory of Hawaii.

## CLINTON JAMES HUTCHINS,

Libellant,

VS.

The American Steamship "GREAT NORTHERN," etc.,

Libellees.

Honolulu, H. T., Tuesday, March 20, 1917. Mr. WARREN.—I have here a deposition which I will read.

The COURT.—Can't you do that as you did with several of the others and let me read them? Several have been read. Let the record show that these have been read in evidence.

Mr. DAVIS.—Yes, it will save a lot of time. The COURT.—All right, I will receive them in evidence. I will read the depositions before I decide the case. That is the deposition of whom?

Mr. WARREN.—This is from Seattle, from Mr. Wiley—C. W. Wiley.

The COURT.—All right, the depositions of C. W. Wiley are read in evidence. Is there any other evidence, gentlemen, on behalf of either libellant or libellee?

Mr. WARREN.—That closes the case for the libellee.

Mr. DAVIS.—Our case is all closed, your Honor.
The COURT.—Very well, proceed with the argument. [417]

Mr. WARREN.—I would like to inquire whether your Honor will still hold under consideration a ruling on the motion that was made at the close of the libellant's case to strike all the evidence regarding negligence of the doctor. Will your Honor rule on that now?

The COURT.—I will not strike out the evidence, and overrule the motion to strike out.

Mr. WARREN.—We except to that, your Honor, and assign the same as error.

Mr. Davis then proceeded with his argument.

Mr. Warren replied.

Mr. Davis closed the argument.

The COURT.—I will render a decision in the case in a few days. [418]

In the United States District Court, in and for the Territory of Hawaii.

### CLINTON JAMES HUTCHINS,

Libellant,

VS.

The American Steamship "GREAT NORTHERN," etc.,

Libellees.

Honolulu, H. T., April 3, 1917.

The Court filed a decision in this case in favor of the libellees.

Mr. C. S. DAVIS.—If your Honor please, I represent Mr. George Davis, the proctor in this case, and would like at this time to note an exception to the decision, finding and judgment of the Court as contrary to the law and the evidence and the weight of the evidence, and assign the same as error, and give notice of an appeal to the Circuit Court of Appeals, Ninth Judicial Circuit.

The COURT.—Exceptions noted and allowed.

Mr. C. S. DAVIS.—We note an exception to each and every finding of fact and law in the decision, and assign the same as error.

The COURT.—All right; you can make them as specific as you like in the record. [419]

Honolulu, H. T., September 5, 1917.

I, H. F. Nietert, hereby certify that the foregoing transcript of testimony, consisting of Three Hundred and Sixty-four (364) typewritten pages, is a

full, true and accurate transcript of my shorthand notes of the testimony taken and the proceedings had upon the trial of the case of Clinton James Hutchins vs. The American steamship "Great Northern," etc., upon the days and at the times in said transcript mentioned.

H. F. NIETERT,

Official Reporter United States District Court. [420]

Order Continuing Cause for Argument Until Return of Deposition of C. W. Wiley.

From the Minutes of the United States District Court, Vol. 10, page 378, Tuesday, March 6, 1917.

(Title of Court and Cause.)

On this day came Mr. George A. Davis, one of the proctors for the libellant, and also came Mr. L. J. Warren, of the firm of Smith, Warren & Whitney, proctors for the libellee herein, and this cause was called for argument. Thereupon it was by the Court ordered that this cause be continued for argument until after the return of the deposition of C. W. Wiley. [421]

#### Proceedings at Argument, and Order Taking Cause Under Advisement.

From the Minutes of the United States District Court, Vol. 10, page 391, Tuesday, March 20, 1917.

(Title of Court and Cause.)

On this day came Mr. George A. Davis, proctor for the libellant herein, and also came Mr. L. J. Warren, of the firm of Smith, Warren & Whitney, proctors for the libellee and claimant, and this cause was called for argument. Thereupon with consent of respective proctors the deposition of C. W. Wiley heretofore returned and filed were considered as read in evidence. Thereafter argument was had by proctors and the case was taken under advisement by the Court and ordered continued until called for decision. [422]

Filed Sept. 13, 1916, at 8 o'clock and 40 minutes A. M. (Sgd.) Geo. R. Clark, Clerk. By————, Deputy Clerk.

In the District Court of the United States in and for the Territory and District of Hawaii.

#### IN ADMIRALTY—LIBEL IN REM.

No. 147.

CLINTON JAMES HUTCHINS,

Libellant,

VS.

The American Steamship "GREAT NORTH-ERN," Her Tackle, Apparel, Furniture, Boats and Appurtenances and Against All Persons Having or Claiming to Have Any Interest Therein and Against All Persons Lawfully Intervening in Their Interest Therein,

Libellee,

and

A. AHMAN,

Master and Claimant.

#### Proceedings Had July 31, 1916.

BE IT REMEMBERED, that on Monday, July 31st, 1916, at 10 A. M., to which date an adjournment was regularly taken from July 5th, 1916, and on Monday, August 7, 1916, at 2 P. M., to which date an adjournment was regularly taken from July 31st, 1916, at my office in the Merchants Exchange Building, 465 California Street, in the City and County of San Francisco, State of California, in pursuance of the Commission to take testimony hereunto annexed, personally appeared before me Ira A.

Campbell, designated as Commissioner in the aforesaid Commission, Walter A. Scott, A. Ahman, A. K. Relf, John B. Morris, S. W. Jamieson, Charles Wall, George Grundy, W. B. Lowenthal, C. S. Mills, W. J. Tomlin, J. B. Switzer, Katie [423] Schnieder, Sam B. Stoy and Samuel Symon, witnesses called on behalf of the claimant.

John W. Cathcart, Esq., of the firm of Thompson, Milverton & Cathcart and Grant H. Smith, Esq., appeared as proctors for the libellant on July 31, 1916 (Grant H. Smith, Esq., appearing as proctor for the libellant on August 7, 1916), and Charles H. Carey, Esq., of the firm of Carey & Kerr, appeared as proctor for the claimant, and the said witnesses having been by me first duly cautioned and sworn to testify the truth, the whole truth and nothing but the truth in the cause aforesaid, did thereupon depose and say as is hereinafter set forth:

#### Testimony of Walter A. Scott, for Claimant.

WALTER A. SCOTT, called on behalf of the claimant, sworn.

Mr. CAREY.—Q. What is your full name?

- A. Walter A. Scott.
- Q. Where do you reside?
- A. 1234 Tenth Avenue, San Francisco.
- Q. What is your business? A. Photographer.
- Q. How long have you been in the business of photographer?
  - A. About seven years in that business exclusively.
  - Q. State whether or not you were employed by

the Great Northern Pacific Steamship Company, or the claimant in this case, Captain Ahman, to make photographs of a certain shower-bath on board the steamship "Great Northern."

- A. I was employed by Mr. Relf of the Great Northern Pacific Steamship Company on May 1, 1916, to make photographs of a shower on the steamship "Great Northern."
- Q. Do you know whether Mr. Relf was Claims Agent for that company?
- A. He so informed me, and I have since learned that he is. [424]
- Q. How many photographs did you make of the shower?
  - A. Three subjects on which I exposed six plates.
  - Q. Have you the plates here? A. I have.
- Q. Produce them and have them marked for identification. A. Yes.
- Q. I show you three photographic prints and will ask you whether these are photographs taken from the plates that you have just produced and identified. A. Yes, they are.
  - Q. Please mark those for identification.
- A. Yes. (The prints are marked "Claimant's Exhibits 1, 2 and 3 for identification.")
- Q. Please state how these photographs were taken of the shower and when did you take them.
  - A. On May 1, 1916.
- Q. Mr. Scott, in testifying in answer to any of these questions you can refer to the number of the exhibit on each of them so as to identify them?

A. In taking numbers 2 and 3, the camera was placed on the tripod in the shower opposite to the one photographed, right back against the wall, and I suspended a 250 watt Mazda light over the camera to furnish the illumination; I used no flash. In making No. 1, the same illumination was used from the same source, and the camera was placed on a stool outside the opening leading into the showers.

Q. Now, will you state whether or not these photographic prints are correct representations of the bath?

A. They are; there has been no retouching or alteration of any kind made either on negatives or on the prints.

Q. These prints then are correct and actual prints directly from these negatives or plates which you have produced here? A. They are. [425]

Mr. CAREY.—I offer the prints in evidence, being "Claimant's Exhibits 1, 2 and 3."

Mr. CATHCART.—We have no objection to the use of these in the place of the plates or negatives. Of course we reserve all right to object on any ground other than as to the form of the question.

Mr. CAREY.—Q. Referring to "Claimant's Exhibit No. 3," I will call your attention to a white line on the right-hand side of the picture. What does that represent? A. That is a marble slab.

Q. Approximately what thickness is that marble slab, do you recollect?

A. My impression is about an inch and a half.

Q. In the center of the picture is what appears to

be a handle, is that a metal handle? A. Yes.

- Q. How is that fastened to the wall?
- A. That is fastened to the back wall of the shower by four screws.
- Q. On the left-hand side of the picture appears to be a number of pipes; were these pipes there when the photograph was taken? A. Yes.
- Q. Overhead in the same exhibit is what appears to be a metal rod on which is attached a curtain by rings; was that there at the time the picture was taken? A. Yes.
- Q. I call your attention to "Claimant's Exhibit No. 2." I notice what appears to be a door-knob at the left hand of that picture; was there a door-knob there when the picture was taken?
- A. Yes, there was a door-knob and a key-hole just below it.
- Q. What is that door-knob, metal or other substance?
- A. I judge from the photograph that it is metal; I did not observe it carefully at the time. [426]
- Q. I call your attention to "Claimant's Exhibit No. 1," wherein there appears to be a basin at the bottom of the shower; was that there at the time?
  - A. Yes.
  - Q. Of what material was that made?
- A. The same material that the porcelain bath tubs are made of.

Mr. CAREY.—You may take the witness.

Cross-examination.

Mr. SMITH.—Q. Mr. Scott, in taking "Exhibits

2 and 3," what change did you make in the position of your camera, if any?

A. No. 3 was made with the tripod at its greatest extension. No. 2 was made with the tripod considerably shortened. The position of the camera was such that it was impossible for me to see from the ground glass what I was getting. I simply had to put the camera right back against the wall and figure out in a general way what I was going to get. No. 2 was made from a lower view point to insure that I should take in all of the basin or bottom of the shower.

Q. What would you say was the elevation of your camera when you took "Exhibit 3," the elevation from the floor?

A. The lens probably was about 5 feet from the floor.

Q. What would you say was the elevation of the lens when you took "Exhibit 2"?

A. It is difficult for me to say exactly, but it was probably a foot or 18 inches lower.

Q. Did you take any other pictures of this bathroom at that time? A. No.

Q. Only three?

A. Only three; three subjects, six exposures.

Q. Where are the other prints from the other exposures?

A. The plates are all here; I do not know that I could tell you which plate of each pair these prints are made from. The [427] plates are very thin because the steamer was about to sail and the time

allowed me for making these photographs was so limited that I could not give full exposures. I think you will see the detail better if you hold the plate so that you look toward that wall behind you through it.

- Q. Did you make any prints from these other plates?
- A. No, I selected in each case the negative that I thought was a little better exposed and made my prints from that.
- Q. In taking "Exhibits 2 and 3" at what distance would you say your lens was from the marble plate directly in front upon which a handle is shown?
- A. That would be a matter of guesswork on my part. I could establish it exactly by measuring the length of the camera and then the distance to the opposite wall.
- Q. But you stated that your camera was against the opposite wall? A. Yes.
  - Q. In taking "Exhibits 2 and 3"? A. Yes.
- Q. So that it was the distance from one wall to the other? A. Yes.
- Q. Deducting therefrom the length of your camera itself?
- A. It would be largely a matter of guesswork for me to say, but I would judge that it was not more than 8 feet from the rear wall of the shower in which the camera was standing to the rear wall of the shower which I was photographing.
- Q. Where was the steamship "Great Northern" when you made these photographs, Mr. Scott?

A. It was lying at one of the piers north of the Ferry Building; I cannot tell you the number now.

Q. In San Francisco? A. Yes. [428]

### Testimony of A. Ahman, for Claimant.

A. AHMAN, called for the claimant, sworn.

Mr. CAREY.—Q. Your name is A. Ahman?

A. Yes.

Q. Are you captain of the steamship "Great Northern"? A. I am.

Q. How long have you been captain of that ship?

A. Since November, 1914.

Q. Is that the date when she first began to operate as a steamship?

A. No. She commenced to operate on the 27th of January, 1915, leaving Philadelphia.

Q. Then November following you took charge as captain of that ship?

A. November previous.

Q. Did you bring the ship to the Pacific Coast?

A. Yes.

Q. From what port?

A. From Philadelphia to San Francisco.

Q. State whether or not you were at San Francisco during or prior to her outfitting and furnishing.

A. Yes.

Q. At what shipyard was she built?

A. William Cramp & Sons.

Q. How many years' experience as a mariner have you had? A. 35 or 40 years.

Q. How long have you been a master?

A. Since I have been on this coast I have been

master about three years. I was master previous to coming to this company, that is, the Great Northern Pacific Steamship Company.

- Q. How many years have you had experience in operating passenger ships?
  - A. 25 years or more.
- Q. How general has been your experience in sailing the seas, as to where you have gone?
- A. I have been pretty much all over the world; I was running to Panama for about 6 or 8 years, going out to China for 12 or 15 years, and the remainder of my time from Alaska to San Francisco, Honolulu. [429]
- Q. You may state whether or not your experience has given you opportunity to observe the manner in which ships are outfitted and equipped for the passenger service and particularly as to the facilities afforded on first-class passenger boats for baths?
- A. In all the ships I have been in, and in all my experience, I never saw a ship that was better out-fitted than the "Great Northern" of the Great Northern Pacific Steamship Company for both shower-baths and everything else, none whatever.
- Q. Your experience has justified your forming a conclusion about that, has it? A. Yes.
- Q. On the "Great Northern" there is a certain shower-bath at which it is claimed the libellant, Mr. Clinton James Hutchins, received injury on or about February 18, 1916? A. Yes.
  - Q. Were you master of this ship at that time? A. Yes.

- Q. About how long had the ship been in the passenger service at the time of that accident?
- A. She had been in the service about a couple of weeks over a year—a year's time you might call it.
- Q. Do you know which shower it was that Mr. Hutchins received his injury in?
  - A. I heard of it, yes, which shower it was.
- Q. I wish you would describe that shower as it was at that time and state whether or not it is in the same condition at the present time.
- A. The flooring of this shower-bath is tiling. The basin is made of the same material. There are marble slabs on each side of the basin. The basin itself slopes toward the center, with a hole in the center for water to be carried overboard, with a slight curved edge on the outside of the basin. It was considered by experts in Philadelphia, when the work was done aboard the ship that these were perfect basins for a ship [430] such as the "Great Northern" and cannot be improved on.
- Q. About what is the size of this basin at the bottom of the shower?
  - A. I should judge about 30 inches, more or less.
- Q. This shower is installed in a room, is it, on the ship? A. Yes.
- Q. Can you say whether or not there is another shower in the same room?
- A. There is a shower opposite this shower that you are speaking of, and also four showers above on the next deck made of the same material, and on the same principle.

- Q. How is this room in which the shower in question was located lighted?
- A. With electric light always burning, never out, night and day.
- Q. With reference to that will you state whether or not the lights afford sufficient opportunity for a person using this shower-bath to see the condition of the bath and the material of which it is constructed and the manner in which it is constructed?
- A. There is plently of light there, all the light that is necessary. All the light that is necessary for anybody; if anybody looks out where he is going where he is stepping he will see the condition of everything; there is more than plenty of light.
  - Q. Where is the light in the room located?
  - A. Right in the center of the deck.
  - Q. In the ceiling? A. The ceiling, yes.
- Q. You say there is another shower in the same room; is that of the same construction and the same dimensions?
- A. The same construction, same dimensions; made of the same material and on the same principle.

  [431]
- Q. You have described at least in part the shower in which the accident happened on February 18, 1916. I will ask you whether or not that shower is in the same condition up to the present time.
  - A. The same now as it always has been.
- Q. What will you say with reference to that on May 1, 1916, when the photographer Mr. Scott took

the photographs which have been offered in evidence here?

- A. Nothing has been touched since the ship left Philadelphia.
- Q. It was in the same condition on that date as it was on February 18, 1916, then?
- A. Yes; the pipes and everything are the same, as far as I know.
- Q. What, if any, facilities are provided in this shower for a person using the same to take hold of, and to support himself when taking a bath?
- A. In the first place, in entering there is a marble slab on each side before the person reaches the entrance like towards the shower; after he arrives at this point there is a handle right in front of him to grab hold of, and also a bar fastened to these two marble slabs which he takes hold of naturally at first; in this position he can hang himself and lift himself and plant himself right in the basin and don't need to have to step over; he can lift himself over if he wishes to.
- Q. I call your attention to the photograph "Claimant's Exhibit No. 3"; please point out on this photograph the location of the marble slab at the side of the bath that you speak of.
  - A. This is the marble slab here.
  - Q. On the right-hand side of the picture?
- A. On the right-hand side. On the left-hand side there is a marble slab also, only it is standing up in this position. You [432] can grab hold of these two marble slabs until you stand in front of the hole.

When you are there it is handy to the handle in front of you; you don't have to step over; you can lift yourself over, if you wish to.

- Q. Captain Ahman, as shown on the photograph "Claimant's Exhibit 3," there appears to be a door-knob and a door at the left-hand side?
  - A. That is the entrance.
- Q. Is that door-knob available for a person to take hold of if they desire to?
- A. If they desired to they could, providing they left the door open.
  - Q. If it is closed, you mean?
  - A. If it is closed?
  - Q. Yes. A. No.
- Q. Never mind about that now. As shown on that exhibit, there is a metal handle, you say? A. Yes.
  - Q. In front of the person using the shower-bath?
  - A. Yes.
  - Q. How is that fastened?
- A. That is fastened right to the marble slab with screws.
- Q. State whether or not that is in a position where it can be availed of by a person wanting to use the bath to steady himself, to keep from slipping or falling?
- Mr. SMITH.—I object to that question upon the ground that it is leading and that it calls for the conclusion of the witness.
- A. Certainly. That is what it is there for. A man could hang himself on that and still it will stay there. It is made fast there you see, with four heavy

(Testimony of A. Ahman.) screws, right in the marble slab.

Mr. CAREY.—Q. On February 18, 1916, do you remember what the condition of the weather was?

- A. Fine weather; we had lovely weather.
- Q. Your ship was on a voyage then from San Francisco to Honolulu?
  - A. From San Pedro to Hilo. [433]
- Q. Do you remember seeing Mr. Hutchins the evening that accident happened, that is, on the 18th of February, 1916? A. I do.
  - Q. Where and under what circumstances?
- A. He was acting as a judge in a mock divorce suit aboard the ship in the lounge-room. I was sitting alongside of him; he spoke to me frequently; he never said anything to me about hurting his shoulder during the conversation.
- Q. You say there was a mock divorce trial going on there? A. Yes; he was acting as judge.
- Q. How many people were present on that occasion?
  - A. There must have been probably 150 or 200.
- Q. Did you see Mr. Hutchins after that during this voyage? A. I don't recollect.
- Q. Will you state whether or not Mr. Hutchins made any complaint to you about having received any injury.
  - A. No; he never spoke to me on the subject.
- Q. Have you ever had any complaints from any passengers or any persons about this shower?
  - A. No, none whatever.
  - Q. From your experience now on board these first-

class passenger ships and considering the opportunities you have had for observing, what would you say as to whether or not this shower-bath as arranged was safe or otherwise?

A. The shower-bath was arranged to be safe; after great consideration of the matter we built it and put it in place; the shower-bath that is aboard the "Great Northern" now is a bath that is the proper thing.

Q. This firm of William Cramp & Sons, will you state what their reputation and general standing is as a shipbuilding concern. [434]

A. Their reputation for first-class passenger ships is first-class, because they have built the "Kroonland" and "Finland," and "St. Louis" and "St. Paul" and quite a number of other large passenger ships; therefore they are people that have knowledge of these things, of installing shower-baths, bathrooms and so forth, aboard ships, and know what they are doing.

Q. Are there any other precautions that could be used, in your judgment, to make this shower-bath more safe than it is at the present time?

A. Not that I know of.

Q. You have said that there are other shower-baths in the ship, are there tub baths also?

- A. Not unless some private party wants a tub bath.
- Q. Is the ship provided with tub baths? A. No.
- Q. Has it bath-rooms?
- A. We have got bath-rooms.
- Q. Are there bath-tubs in these rooms made of porcelain? A. Yes, big porcelain tubs.

- Q. How many bath-rooms are there on the ship?
- A. For the passengers' use?
- Q. Yes.
- A. There must be about 24 or 26; I couldn't say for certain.
- Q. I just want it approximately. Now, are these tub baths that you speak of available for use by passengers if they desire to use them?
  - A. Yes, always, whenever they are called for.
- Q. What is the fact as to whether or not it is optional with passengers to take a shower-bath or tub bath or not to take any, for that matter?
- A. They can have whatever they want to, or let it go if they do not want it; it is optional with the passenger, whether he wants to take a bath or not. [435]

#### Cross-examination.

- Mr. CATHCART.—Q. How long did I understand you to say you have been a master of a passenger steamship?
- A. These last two or three years this time—before I got the "Great Northern" I was also master on different vessels.
- Q. My question is how long have you been master of passenger steamships?
- A. I have been master of passenger steamships the last—well, call it the "Great Northern."
- Q. So that the first passenger steamship that you have been master of is this "Great Northern" steamship?

A. But I was also master of the "Santa Clara" before that.

- Q. When were you master of the "Santa Clara"?
- A. In 1911.
- Q. Where was the "Santa Clara" then running?
- A. She was running between San Francisco and Eureka.
  - Q. What is her burden? A. About 1500 tons.
- Q. Prior to being master of the "Santa Clara" were you master of any passenger steamship?
  - A. No.
- Q. Had you been first officer on any passenger steamship prior to the "Santa Clara"? A. Yes.
  - Q. What was the steamship?
- A. The "City of Peking," "China," "City of Sydney," "City of Panama."
  - Q. Does that exhaust the list? A. Yes.
- Q. The "Peking" and "China" were on the run between San Francisco and Hongkong?
- A. Yes; and also part of the time the "Peking" was on the run to Panama, from San Francisco to Panama.
- Q. And the other steamships you have named were on the run between San Francisco and Panama?
  - A. Yes.
- Q. Had you been second officer on any other passenger steamship prior to your service as first officer? [436]
- A. Yes, I was second officer on the "City of Panama."
  - Q. On what other steamers, passenger steamers,

had you served prior to your experience as second officer?

- A. I was on the "Aztec"; I was on the old "Willamette," and besides in sailing ships.
  - Q. What was the run of the "Aztec"?
  - A. She was on the Panama run at the time.
- Q. The steamships you have named have been the only ones on which you have served in any capacity during your maritime career? A. Yes.
- Q. Now, of those steamships you have named, what ones were equipped with shower-baths?

  A. None.
  - Q. The only one being the "Great Northern"?
  - A. Yes.
- Q. You have stated that in reference to the shower-bath in question there were marble slabs on each side? A. Yes.
  - Q. By which a person could catch hold?
  - A. Yes.
  - Q. What is the thickness of those slabs?
  - A. About an inch and a half.
- Q. They are slabs which form the side walls of the bath? A. Of the bath, yes.
- Q. As you face the bath the slab at the left is right up and plumb with the wall where the door is, is it not?

  A. Yes, at right angles with the door.
  - Q. And plumb up against the wall?
  - A. Plumb up against the wall.
  - Q. How can anybody eatch hold of that slab?
- A. It stands out at a right angle from the wall. [437]
  - Q. I call your attention to this slab.

- A. That stands at right angles to the wall.
- Q. Just wait a minute: calling your attention on "Exhibits 2 and 3" to the slab on the left as you face the bath, that slab is close up to the wall, is it not?
  - A. No.
  - Q. Does it stand out?
  - A. It stands out at right angles.
  - Q. How far out?
- A. The width of the tub, the width of the base of the tub; it stands out at right angles.
- Q. I understand that; wait a minute, Captain; isn't it fastened close to this other slab along here?
  - A. No, it stands right straight out.
  - Q. That photograph then does not show it right?
- A. It stands right out like this (illustrating); here it is; just like that.
- Q. You do not quite understand me, Captain; look at the slab on the right.
  - A. Yes, that is the same thing.
- Q. That stands out, and on the other side of it there is nothing so that a person could catch hold of that, could they? A. Yes.
  - Q. The slab on the left is-
  - A. —Is the same way.
  - Q. Stands out? A. The same way.
- Q. So that between it and the wall or casing of the door there is some space, is there?
- A. Oh, yes; it is at right angles, it is the same as I told you before; it stands out like this; you see, it stands out like that (illustrating). That is the way it stands out; this don't show on the photograph, but

448

(Testimony of A. Ahman.)

you can see it practically, on the edge; both of them are alike, on both sides; there are marble slabs on both sides; you can catch hold of both of them. [438]

- Q. How far out is it from the slab or wall to there (pointing)?
- A. All of 30 inches; standing straight out, at right angles.
- Q. What is the space between the slab on the left-hand side as you face the bath-room to which we have been referring, and the slab or wall by the door?
- A. There is all kinds of space there because there is an entrance door on both sides of the slab.
- Q. When the door is closed does the slab on the left stand out away from the door?
  - A. At right angles, yes.
  - Q. That is the door with the knob? A. Yes.
  - Q. Represented in photographs 2 and 3?
  - A. Yes.
- Q. The rod or bar to which you have referred, is at the top of the bath, is it not? A. Yes.
  - Q. And on it is swung a curtain?
  - A. A curtain, yes.
  - Q. Rubber curtain?
  - A. Well, it is a cloth curtain.
  - Q. That being the travelling bar for the curtain?
  - A. Travelling bar, fastened on rings, yes.
  - Q. How high is that from the floor of the bath?
  - A. I should judge about 6 feet.
  - Q. Six feet?
- A. Yes; it is within easy reach for a man to catch hold of; in fact, it is put there with that in view,

for a man entering the bath to catch hold of that besides the handle,—to answer two purposes.

- Q. The primary purpose of that is not to run the curtain on?
- A. No; it is put there to catch hold of, to grab hold of, as well as that for the purpose of the curtain.
- Q. As suggested by my associate, I would like to ask you, in referring to "Exhibt 3," how it is that the door appears in the photograph as close up against the left-hand pipe? [439]
- A. Well, that is left open; it is left open in that shower-bath; if it would be closed you would not see it; it would be over at the other end.
- Q. That door, then, as shown in the photograph is open, is it?
- A. It is open in order to enter the entrance to the shower; that is the way it looks to me.
- Q. That is, the door has been left open and swung back against the marble slab?
  - A. Yes, or towards the marble slab.
- Q. The entrance being then from the left through the door as opened as you look at the photograph?
  - A. Yes.
  - Q. Are there two slabs there at the left?
- A. No, there is one slab on each side, only one slab on each side; I don't know what causes that to look like another slab; that must be a part of the door that looks like that.
- Q. These pipes represented in the photographs are the hot and cold water for the shower?
  - A. Yes, hot and cold water.

- Q. What is the height of that handle from the floor of the bath itself, the basin?
  - A. About 5 feet, I guess; something like 5 feet.
  - Q. What is the width of that handle, do you know?
  - A. I should say it must be about 7 inches long.
  - Q. 6 or 7 inches long?
  - A. Yes, by  $1\frac{1}{2}$  inches wide.
  - Q. You say that was there on February 18, 1916?
  - A. Yes.
- Q. When did you first observe the handle there, Captain?
- A. I could not recollect just exactly, but so far as I know that has been there ever since the ship came out.
- Q. Do you have a recollection of seeing it there until after the accident, when you have any special memory of seeing it? [440]
  - A. It was there before.
  - Q. You have a special memory of seeing it?
  - A. Yes.
  - Q. Was Colonel Sanborn hurt in this bath?
  - A. Not that I know of.
  - Q. You never heard of his being hurt? A. No.
  - Q. In any of these baths? A. No.
  - Q. Did you ever hear of anyone else being hurt?
  - A. No.
- Q. Did you ever hear of Mr. E. C. Stuart, the President of the Union Savings Deposit Bank of Stockton having been thrown against the steampipes and burned?

Mr. CAREY.—I object to that question as irrelevant and immaterial.

A. No.

Mr. CATHCART.—Q. Can you state about how high the rim of the basin is from the floor of the basin?

A. About 2 inches or 2 inches and a half, something like that; I never measured it but I should judge so.

Q. The floor of this basin is the same now as it was February 18th, 1916, is it? A. Yes.

Q. No mat there? A. No.

Q. There were no rubber mats or any kind of mats on the floor on February 18th, 1916?

A. No, because it is not considered sanitary.

Q. You are acquainted with the sister ship, the "Northern Pacific" are you? A. Yes.

Q. With the arrangement of the baths there?

A. Yes.

Q. Of the showers? A. Yes.

Q. Aren't there handles on the "Northern Pacific" in the shower-baths?

A. They are identically the same in both ships. [441]

Q. Identically the same? A. Yes.

Q. Is the whole arrangement of the showers identical on both ships? A. Yes.

Q. In every respect?

A. In every respect so far as I know.

Q. You state you are familiar with both?

A. Yes.

- Q. When did you first learn of this accident to Mr. Hutchins?
- A. The first I learned of it was in Honolulu. He wrote a letter to the agent there asking for \$500.
  - Q. What was the first you knew of it?
  - A. That was the first I knew of it.
- Q. Did you have any talks with any of the steamship crew or stewards in reference to this bath-room?
  - A. No.
  - Q. Or the arrangement of it? A. No.
- Q. Who had charge of the shower-baths on that trip?
- A. We have got bath-room stewards to look out for the bath-rooms. I could not say who was; I don't know the man myself.
  - Q. Anybody over the bath-room stewards?
  - A. Chief Steward.
  - Q. They are all under the chief steward?
- A. Yes, all under the supervision of the chief steward.
- Q. No one in special authority over the baths themselves except the bath stewards? A. No.
- Q. Do you know who was in charge of the baths on this morning? A. I believe the man is here.
  - Q. On that day?
- A. I believe the man is here who had charge on that day.
  - Q. Do you know his name?
  - A. I don't know his name.

Redirect Examination.

Mr. CAREY.-Q. As captain of the ship, what

supervision do you have over the baths? [442]

- A. Well, I have got practically no supervision, as far as that goes, except I make my regular inspections and see that everything is clean and in good condition.
  - Q. How often do you make those inspections?
- A. Sometimes once a day; it depends on the run; if we go on the Honolulu run we have inspections once a day about 11 o'clock.
  - Q. About 11 o'clock every day on the voyage?
  - A. Yes.
  - Q. What do you do on those inspection trips?
- A. See that everything is kept clean and in good sanitary condition.
- Q. Now, on this particular run to Honolulu or Hilo did you have such inspections daily?
  - A. Yes, except Sundays.
- Q. What was the condition of the ship's baths as to cleanliness?
  - A. Why, first class all the time.
- Q. What was its condition as to being in good order, kept in proper shape?
  - A. Everything was in proper shape. [443]

### Testimony of H. K. Relf, for Claimant.

H. K. RELF, called for the claimant, sworn.

Mr. CAREY.—Q. What is your name?

- A. H. K. Relf.
- Q. Where do you reside?
- A. Portland, Oregon.

- Q. What relation have you to the Great Northern Pacific Steamship Company?
  - A. I am General Claim Agent.
- Q. State whether or not you are familiar with the steamship "Great Northern."
  - A. I am; I am quite familiar with it.
- Q. Do you know the shower-bath in which Mr. Hutchins claims he was hurt on February 18, 1916?
- A. I was informed by the bath steward of the particular shower in which he was going to take a bath.
- Q. State whether or not in connection with your duties as claims agent it would be for you to make investigation of the circumstances of an accident of that kind. A. Yes.
- Q. What is the fact as to whether or not you made an investigation?
- A. Yes; when I heard that Mr. Hutchins made a claim against the steamship company on account of having received injuries I investigated for the purpose of ascertaining the fact in connection with the accident.
  - Q. Did you examine the shower-bath?
  - A. I did.
  - Q. How soon after February 18, 1916, about?
  - A. I think it was on the return from Honolulu.
- Q. That is sufficient; I only want to approximate it. How frequently have you seen this shower?
- A. I should say once in a month. I have made trips on the boat as frequently as once a month, and either the "Great Northern" or "Northern Pacific" is laying at Flavelle.

Q. You say once a month: during what periods of once a month; how long have you had your inspections once a month? [444]

A. I do not make regular inspections or anything of that kind; I look over the ships when I am on them.

Q. What I am getting at is, how frequently you have seen that bath? Have you seen it once or twice or a dozen times?

A. I have made particular inspection of it; I should say, 6 or 8 times since this accident happened.

Q. Did you employ the photographer to make these photographs, Claimant's Exhibits 1, 2 and 3?

A. I did.

Q. Did you go with him to make the photographs?

A. I was present when the photographs were taken.

Q. I wish you would describe the shower-bath?

A. The room in which these shower-baths are located is on the C deck, almost amidships. The entrance to the room is from the passageways on both sides of the ship. There are two showers in this room on the C deck opposite each other. The base or receptor of the shower-bath is 30 inches square. The rim is 6 inches high, the top of the rim being 6 inches above the tile floor out of the bath-room. The bottom of this rim is about  $3\frac{1}{2}$  inches in width; from the edge of the receptor to the waste in the middle of it there is a fall of 1/4 of an inch in a distance of 11 inches or 11½ inches. The shower in which Mr. Hutchins went to take his bath, as I was

informed by the bath steward, was located upon the port side of the ship. Upon entering that shower there would be a marble slab on his right hand; the slab is about one inch in thickness, 76 inches high and 32 inches wide. On the left of the shower-bath there is another marble slab which is up against the wall of the heater-room, and the door which is shown in the photograph is the door to the heater-room. Then on the marble slab to the left of a person as they are facing the shower-bath are three [445] pipes with valves which are used in regulating the flow of the water and the temperature of the water; the back wall of the shower is another marble shower to which is attached a grab or a hand-hold which is 60 inches above the floor of the room. At the upper part of the slab is a rod about an inch and a quarter or an inch and a half in diameter on which a curtain is suspended by means of rings, opposite to this particular shower-bath compartment is another identically the same in construction. There is a space of 26½ inches between the two receptors.

Q. This door to the heater-room, is that open or shut? A. Shut.

Q. Is it kept shut?

A. I suppose so except whenever the attendant or whoever regulates it has occasion to use it.

Q. Entering the shower-bath what facilities present themselves to a person desiring to take a bath to safeguard from falling?

A. There is a marble slab on his right hand, a rod which is above him about 72 inches from the floor;

the three pipes that are on his left hand; the first pipe is a cold water pipe; he could catch hold of that; and then by reaching over to the grab on the back wall of the shower-bath, I would say that would be the best means of protecting himself or steadying himself while stepping into the receptor.

- Q. How about the door-knob that you speak of; is that available?
- A. It is available; it could be used for that purpose.
- Q. The basin of the bath you say is about 30 inches square?
  - A. The outside dimensions is 30 inches.
- Q. Where is this overhead pipe that you speak of, 72 inches above the floor; is that at the forward part of the bath as you enter?
  - A. That is right at the opening. [446]
- Q. What about the curtain that hangs there—is there a curtain? A. Yes.
  - Q. That slides on rings, does it? A. Yes.
- Q. What would you say, Mr. Relf, as to whether or not a person could if he wished take hold of the curtain itself? A. Yes, he could.
  - Q. What material is that curtain made of?
- A. It seems to me it is a cloth treated in some way to make it waterproof; almost a coating of rubber on it; I do not think it is rubber; it is not a rubber curtain.
- Q. The floor of the bath is composed of what material?

  A. Tiling.
  - Q. Can you describe the slope of the floor?

- A. The floor itself of the bath-room is level.
- Q. I am speaking of the shower?
- A. That is porcelain; the base or receptor of the shower-bath is porcelain.
- Q. You call it a receptor; how much of a slope is there in there?

  A. One-quarter of an inch.
  - Q. What is that slope for?
  - A. For water to flow.
  - Q. Drainage?
- A. Drainage; it slopes toward the waste in the middle of the receptor.
- Q. Did you observe anything about that base or receptor that was difficult to stand upon, or that would be more difficult than any other porcelain slab would be to stand upon?
  - A. No, it is the same material as in the bath itself.
- Q. Did you notice anything that would indicate whether it was unsafe or dangerous?
- A. I could not see anything dangerous about it. [447]
- Q. What would you say as to whether or not there was any faulty construction in that respect, and state in what respect if at all.
- A. I cannot conceive of any improvement that could be made.
- Q. Did you observe any condition there that would indicate to your mind that there was any likelihood of a person using the bath to slip or fall?
- A. So far as I could see there was every safeguard, every facility that a person would want to use in order to protect himself, to keep from falling.

# American Steamship "Great Northern" et al. 459 (Testimony of H. K. Relf.)

- Q. How was this metal handle that you speak of fastened?
  - A. It is fastened by screws to the marble slab.
- Q. What is the fact as to whether or not it was sufficiently strong to sustain the weight of a person should they take hold of it?
  - A. It is fixed, immovable, against the slab.
- Q. These facilities for taking hold that you have described, state whether or not they were visible or could be perceived by a person making use of the bath?
- A. They could plainly be seen; the bath-room is lighted by a powerful electric light which is in the middle of the ceiling and the rays from the light plainly show all the conditions, even inside the shower-bath stalls.

#### Cross-examination.

Mr. CATHCART.—Q. What is your age, Mr. Relf? A. 45.

- Q. You are a resident of Portland, are you?
- A. Yes.
- Q. Is that your native place?
- A. I was born in Wisconsin.
- Q. How long have you been connected with the steamship company?
  - A. Since it commenced operations.
  - Q. That was when?
- A. In January, 1915; the steamship "Great Northern" [448] arrived in San Francisco in February, and my employment as general claims agent of the steamship company was made at that time.

Q. Had you ever been employed by the Great Northern Railroad Company prior to that time?

A. No—just for a few months about 20 years ago. In explanation of my principal duties, they are as general claim agent of our rail lines, the Spokane, Portland and Seattle.

Q. Part of the Great Northern system?

A. So considered, yes; affiliated with the Northern Pacific and Great Northern Railway.

Q. This steamship was run in connection with that between that and Flavel—

A. (Intg.) Between San Francisco and Portland; the Spokane, Portland & Seattle operates a train from Flavel to Portland.

Q. As a matter of fact, you did not inspect or examine these bath-rooms until after you had received a report of the accident?

A. Not that particular bath-room, no; I had occasion to use the shower-baths on the ship.

Q. On the "Great Northern"?

A. Yes; I never used that particular one.

Q. I mean on that deck? A. No.

Q. On the upper deck?

A. I used the shower-baths on "A" deck in the bachelor rooms; the shower-baths are the same as the public showers are on the "B" and "C" decks.

Q. You never were in this bath-room until after the report of the accident?

A. Yes, I had been in the bath-rooms before but not to make any particular inspections of them.

Q. It was after the report of the accident, was it

not, that you [449] made this examination and these measurements?

A. Yes.

- Q. To which you have testified? A. Yes.
- Q. When was that done?
- A. I think that I am safe in saying I made my first inspection on March 12 or 13, when the ship was in port at San Francisco. By referring to my file, I could tell when I first heard of the accident, and I know that I took the first opportunity to make this inspection. I was in San Francisco at that date, and I think the "Great Northern" was in San Francisco at that time; I am quite certain that it was on that date.
  - Q. That would be March 13, 1916? A. Yes.
- Q. You have not given us, as I remember it, the dimensions of the receptor or basin inside of the rim, the inside dimensions.
- A. The rim is  $3\frac{1}{2}$  inches in width at the bottom, and the inside of the rim slopes one-half inch, so that at the top of the thickness of the rim would be about three inches—the inside of the rim slopes  $\frac{3}{5}$ ths of an inch instead of  $\frac{1}{2}$  an inch.
- Q. You have not, then, the dimensions of the basin inside at the bottom, have you?
  - A. It would be 23 inches square.
- Q. From the inside edge all around it is 11 inches to the waste or drain-pipe in the center of the receptor or basin?

A. To the metal; you see, the waste is about 3 inches in diameter; there is a little metal cap with holes in it through which the water runs.

- Q. This rod up above at the entrance of the shower is the rod on which the curtain runs, is it not?
  - A. The curtain is suspended from that rod; yes.
- Q. That is what the rod is there for, is it not, in order to run [450] the curtain on?
  - A. That is one of the purposes; yes.
- Q. Do you want us to understand that that rod up above there is put there for the purpose of catching hold of by a person entering the shower-bath?
- A. I would say that is one of the uses for which it was intended.
  - Q. One of its purposes? A. I think so, yes.
- Q. Now, these pipes that you speak of, they are there for the purpose of running the water into the shower-bath, are they not? A. Yes.
  - Q. And they are hot and cold, you say?
  - A. Yes.
  - Q. Hot and cold water? A. Yes.
  - Q. The first pipe, you say, contains cold water?
  - A. Cold water.
  - Q. And the second pipe, hot water?
  - A. No, the third pipe is the hot-water pipe.
  - Q. What is the middle pipe?
- A. I think that the water comes in and then passes through the valve, and I believe that the middle pipe is where the water goes from the valve to the shower, whatever they call that at the top that the water comes from.
- Q. The purpose of these pipes is the conveyance of water into the shower, is it not? A. Yes.
  - Q. They are not there for the purpose of being

caught hold of by anybody entering the bath, are they?

- A. They are there and could be used for that purpose.
  - Q. They could be, and especially the hot one?
  - A. No, I would not want to use the hot one.
- Q. Don't you know as a matter of fact that a Mr. Stuart, of Stockton, was thrown against the hotwater pipe and severely burned?
  - A. I never heard of it.
  - Q. Or burned—never heard of it?
- A. No, I never received any report of any such accident. [451]
  - Q. Never heard of it?
- A. I heard that one man—I don't know who it was—that some man at some time was burned by coming in contact with the hot pipe.
  - Q. In this bath?
- A. I don't know whether it was that particular one. I never received a report on it.
- Q. Either one of the two on the "C" deck, was it not?

  A. I don't know.
- Q. Now, this curtain slides along this rod, does it not?
  - A. It is suspended on rings and the rings slide.
  - Q. So that it will slide right along? A. Yes.
- Q. You think a person could catch hold of that curtain as a measure of precaution so as to prevent falling?
  - A. I think so, yes, assist in steadying him.
  - Q. How high is that door-knob from the floor of

(Testimony of H. K. Relf.) the bath-room, the tile flooring?

- A. I would say it is about 32 or 34 inches from the floor.
- Q. Now, that door-knob is there for the purpose of opening the door, isn't it? A. Yes.
- Q. It is not there for the purpose of being caught hold of by anybody entering the bath, is it?
- A. I do not suppose that would be the primary use, no. The door-knob is for use in opening the door.
- Q. And the curtain rod is generally for the use of running a curtain on it, isn't it? A. Yes.
- Q. Where is this electric light that you speak of? Is it in the ceiling between the two baths?
- A. No, it is about in the middle of the room; it would be about 30 inches from the slab that forms the side of the shower-bath. [452]
- Q. I show you Claimant's Exhibit 3. Can you give us an idea as to where that light would be, opposite this door, or how?
- A. Here is the opening between the two stalls, or two showers; it is right opposite the middle of that opening, and I should say about 30 inches from the side of the shower-bath stall.
- Q. That would be 30 inches beyond the slab shown on the right of Claimant's Exhibit 3? A. Yes.
- Q. The measurements that you have testified to, were they made by yourself? A. Yes.
- Q. How did you arrive at the fall between the waste and the edge of the bowl or basin?
  - A. I took a straight edge and laid it across the

top of the receptor and then I measured down from this straight edge of the bottom of the receptor in the middle and also on the edge.

#### Redirect Examination.

Mr. CAREY.—These photographs, Claimant's Exhibits 1, 2 and 3, that have been called to your attention on cross-examination, are the photographs that were taken by Mr. Scott at your request?

- A. Yes.
- Q. State whether or not they correctly represent the situation. A. They do.
  - Q. Are they accurate photographs of this shower?
  - A. Yes.
- Q. You say there are a number of shower-baths on this ship; approximately how many?
- A. On the "C" deck there are two public shower-baths; on the "B" deck there are 4, and in the bachelor apartments, there are 14 bachelor rooms, and I would say that there are 8 shower-baths.
- Q. What is the fact as to whether or not these are of similar construction or otherwise to the one in question?
- A. They are all the same; I have not been able to notice any difference in them. [453]
- Q. What other bath facilities are furnished on this ship?
- A. There are tubs that are for the use of passengers in general, in addition to the tub baths which are with the suites.
  - Q. What kind of tub baths are they?

- A. They are porcelain tubs. The sides are about the same height as an ordinary bath-tub when a person is home or in a hotel.
- Q. Have you a diagram of the floor arrangement of this shower-bath in question? A. Of the room?
  - Q. Yes.
  - A. I have just a rough sketch that I made.
  - Q. I thought maybe you had one.
  - A. No, I never made one. [454]

### Testimony of John B. Morris, for Claimant.

JOHN B. MORRIS, called for the claimant, sworn.

Mr. CAREY.—Q. State whether or not you were an officer on the steamship "Great Northern" on February 18, 1916.

- A. Yes, I was chief engineer.
- Q. How long had you been chief engineer prior to that time? A. Do you mean on that ship?
  - Q. Yes, on that ship? A. Since June, of 1914.
- Q. Have you continued as chief engineer of that ship say up to yesterday? A. Yes.
- Q. During that time has the ship been in constant service, or otherwise?
- A. It has been in constant service, except for two weeks while we were giving her engines an over-hauling.
- Q. Do you know the shower-bath in which Mr. Hutchins claims that he was hurt? A. Yes.
  - Q. I wish you would describe it briefly.
  - A. Well, the particular shower in question is

about 30 inches square, enclosed, and it is about seven feet high, I should judge; both sides of it are enclosed by a marble slab, one is open, and the other is against the wall; it has a hand-hold in back of it, probably five feet from the ground; it has a curtain rod which is very heavy, and very heavily secured, about six feet high.

- Q. At the front of the bath?
- A. At the front of the bath; and then it has the pipes that supply the shower; there is one cold-water pipe on the outboard side of it, and on the inside is the hot-water pipe, and then the central pipe that leads up and back to the shower itself, and that is controlled by a valve with a handle on it probably 6 inches long; the base of it is porcelain, and I should say it is about 5 inches deep, with a drain hole in the center of it. [455]
- Q. What is the fact as to whether the floor slopes toward the drain hole or otherwise?
  - A. It does slope.
  - Q. How much?
  - A. I should say about one-half inch.
- Q. Now, what facilities are there for a person using the bath to safeguard against slipping or falling?
- A. The handhold in the back and the curtain pole which is put in there very securely, on account of a person grabbing that curtain and tearing it down—it never had anything done to it that I know of, and then at the left-hand side the knob of the door to the heater-room, not intended to be, but would be avail-

able; and then of course these pipes, and the handle.

- Q. On the right-hand side, you say there is a slab of marble? A. Yes.
  - Q. Is that available for that purpose?
  - A. Yes, indeed.
- Q. What would you say, Mr. Morris, as to whether or not there was any danger of a person using that bath having an accident?

Mr. CATHCART.—We object to that as leading and calling for the conclusion of the witness.

Mr. CAREY.—I will put another question:

Q. What opportunity, if any, would a person have in using that bath to see the facilities which you have described and thereby prevent slipping or falling?

Mr. CATHCART.—Contending that each and every objection with reference to questions calling for the conclusion of the witness is reserved under the stipulation, yet, as a matter of precaution, we now object to the question as asked, on the ground that it calls for a conclusion of the witness.

Mr. CAREY.—I will ask another question: Q. Describe the condition of this shower-bath with reference to the facilities afforded to safeguard against accident and with reference to the lighting, [456] and the opportunity that persons using the baths would have to see what facilities were afforded.

Mr. CATHCART.—We object to that as being in itself a double or triple question.

A. The place is flooded with light; therefore anyone could see anything inside there.

Mr. CAREY.—Q. Where is the light located?

A. I should say the light is in the middle of the entire shower-room.

Q. Have you observed anything about that shower-bath that would be likely, in your judgment, in any manner to cause a person using the same to slip or fall?

Mr. CATHCART.—Objected to as calling for a conclusion of the witness and as leading.

A. No.

Mr. CAREY .-- Q. Do you know Mr. Hutchins?

A. Yes.

Q. Do you remember the time when he was supposed to have been hurt there on February 18, 1916?

A. Yes.

Q. Did he say anything to you about it?

A. Yes, he told me that he had fallen in the shower.

Q. Did he tell you how he happened to fall?

A. The way he spoke of it to me was that in stepping there he had stepped on the rounding and lost his balance through that—the rounding on the bottom of the base.

Q. Did he say anything to you as to what he claimed with reference to the liability of the company?

A. When he mentioned it to me I said to him, "Why didn't you hold on to something? You are on a ship; you are not on shore."

Mr. CATHCART.—We move to strike that out as being irresponsive.

Mr. CAREY.—Q. What did he say?

- A. Well, he complained of the way that that base was built; he said that that should be [457] of absolutely square corners.
  - Q. Did he say anything else? A. No.
- Q. Specifically, did he make any claims to you that there should be a rubber mat in the bath?

Mr. CATHCART.—Objected to as leading.

A. No.

Mr. CAREY.—Q. Do you know whether Mr. Hutchins wears glasses? A. Yes.

- Q. Do you know whether or not he had his glasses on at the time he took his shower-bath?
  - A. That I don't know.
- Q. Since you have traveled on the "Great Northern," how many passengers had she handled?
- A. I don't know the exact figures, but I always remember one thing, that in the summer of last year, in three months the two ships carried 54,600 people.
- Q. How frequently are the shower-baths used on that ship?
- A. That I would not be able to tell; they use them all the time; a continuous stream of people using them.
- Q. Has any complaint been made to you as an officer of that company about the manner of construction or the condition of the baths?
  - A. No; that is the only complaint I ever heard.
- Q. Have you ever known of any complaint being made that the bath is dangerous? A. No.
- Q. What is your opinion, from your observation and experience as an officer on board ship, as to

whether this bath is properly and safely constructed or otherwise?

Mr. CATHCART.—I object to that as calling for a conclusion of the witness and leading.

A. I cannot see myself—I would be the one to suggest an improvement if any was necessary there, and I have never felt the need of doing so.

Mr. CAREY.—Q. As chief engineer on board this ship, is it a part of your duty to make inspections of the baths, and particularly [458] this bath in question?

A. I have a man that does that; if anything would be wrong, he would report it to me.

Q. What is the position of this man?

A. He is a plumber.

Q. You have had experience on other ships, have you? A. Yes.

Q. Have you ever seen any baths that were differently constructed from these? A. No.

Q. Did you ever know of any shower-baths being provided with mats of rubber or other material?

A. No; I think that would be rather unsanitary.

Q. What would be the fact as to whether or not it would be more dangerous or otherwise?

A. I don't think it would be more dangerous,—if one had soap on their feet, soapy water, that would help to slide them on rubber.

#### Cross-examination.

Mr. CATHCART.—Q. You are chief engineer of the "Great Northern"? A. Yes.

Q. How old are you? A. 45.

- Q. How long have you been in maritime service?
- A. 18 years.
- Q. As engineer?
- A. Well, I have been an engineer for probably 16 years.
  - Q. Assistant and then chief?
  - A. I have been chief 11 years.
  - Q. What steamers?
- A. On the "Siberia," the "Rose City," the "Lurline," and the "Great Northern," and "Northern Pacific."
  - Q. When were you on the "Siberia"?
- A. I was chief of her for  $4\frac{1}{2}$  years, between 1905 and 1910.
- Q. As chief engineer, have you duties in connection with the bath-rooms?
- A. Only that I have the upkeep of them, that is, the water supply, and so on.
- Q. But merely to see that the water supply is right?
  - A. To see that the water supply is right. [459]
  - Q. Nothing else? A. Nothing else, at all.
- Q. You do not inspect the bath-rooms to see if they are clean, or sanitary, or safe, or anything else?
  - A. No.
- Q. And never have as engineer, chief or assistant, or otherwise, have you?
- A. No. It would be my duty as an officer of the ship, if I saw anything in an unsafe condition to call someone's attention to it.
  - Q. Yes, of course, if that should come under your

notice. Do you know the date on which Mr. Hutchins was hurt?

- A. I don't remember particularly.
- Q. Do you remember the time of day?
- A. I remember about the time. I remember it was in February.
  - Q. The time of day?
  - A. Yes, it was before supper in the evening.
  - Q. When did you first learn of it?
  - A. At the supper-table; they sat alongside of me.
  - Q. Mr. Hutchins?
- A. Mr. Hutchins and Mrs. Hutchins, his wife, sat alongside of me.
- Q. And he told you, then, of having been hurt in one of the shower-baths? A. Yes.
- Q. This conversation that you speak of was at the supper-table, was it? A. Yes.
- Q. Who was present besides yourself and Mr. Hutchins?
  - A. I don't remember the other people at the time.
  - Q. Did you examine the shower that evening?
- A. Not that evening, but the following morning I went in there and took a look at it.
  - Q. Who with, anybody? A. Just myself.
  - Q. Yourself alone? A. Yes. [460]
- Q. That door that leads out of this shower-bath opens out, does it not?
- A. It opens this way. Here is the heater-room; the entrance to the shower-room is over on this side, and over here, that is the entrance to the heater-

room, where the heaters are located, that is always closed.

- Q. Do I understand it opens toward the bath, then? A. Yes.
- Q. On these steamers of which you have spoken as serving as assistant engineer or chief engineer, did they have showers? A. No.
- Q. So the first steamship on which you have served that had showers is the "Great Northern"?
- A. Yes, "Great Northern" and "Northern Pacific."
  - Q. You have been on the "Northern Pacific," too?
  - A. Yes.
- Q. Those two steamers are the only ones you have served on where there have been showers?

A. Yes.

#### Redirect Examination.

Mr. CAREY.—Q. What was the condition of the weather on the day in question?

A. The ship was rolling; not very much; I should say a roll of probably 4 degrees.

Mr. CATHCART.—We object to this as not being redirect examination and move to strike out the last answer.

Mr. CAREY.—Q. What was the condition of the weather as to whether it was stormy that day, or otherwise?

Mr. CATHCART.—Same objection, as not being redirect examination.

A. I should not say it was stormy; she had a long,

gentle roll. I think the weather was pleasant that day.

Mr. CATHCART.—The "Great Northern" doesn't roll much, anyway, does it?

A. All ships roll if they get the proper wave length. [461]

### Testimony of A. Ahman, for Claimant (Recalled).

A. AHMAN recalled.

Mr. CAREY.—Q. Do you desire to make a correction of the testimony you gave this forenoon? If so, in what respect?

A. Yes, in regard to the photographs. I was always thinking about the port side of the ship instead of the starboard side.

Q. As a matter of fact, on the left side of this shower-bath as you enter it, is there a marble slab?

Mr. CATHCART.—I object to that as leading.

A. Yes.

Mr. CAREY.—Q. State whether or not the marble slab is separate from the wall or is attached to the wall.

A. As you enter it first it is separate from the wall, but the after one, it is close up to the wall.

Q. The one on the left-hand side as you go in is the one that is close to the wall, then, is it?

A. Yes, that is the after one.

Q. In giving your testimony this forenoon as I understood it, you described the slab on the left-hand side as though it were available to take hold of

by anyone using the bath. Do you wish to make any correction as to that?

A. The one on the starboard side is the one that you catch with the right hand; the after one is against the wall.

#### Cross-examination.

Mr. CATHCART.—Q. Your attention was called to the fact that you had made an error in your testimony? A. Yes. I got thinking about it.

- Q. Who told you about it?
- A. I got thinking about it.
- Q. Didn't anybody speak to you about it?
- A. No.
- Q. You were sitting here and heard the testimony of the other witnesses as to the position of that slab, weren't you? [462]
  - A. Yes. I had it in mind it was the other side.
- Q. You heard Mr. Relf testify as to the position of that slab? A. Yes.
  - Q. And the engineer, Mr. Morris? A. Yes.
- Q. When you gave your testimony in the first instance, you were thinking about the starboard side?
- A. About the starboard side; that is the reason I could not get that line; you remember that dotted line, that is the bulkhead that runs right across, and of course there will be a bulkhead on the other side as well.
- Q. But when you did give your testimony this morning, you spoke about both sides, didn't you?
  - A. No, I did not.

- Q. Didn't you speak about both sides? A. No.
- Q. I thought you said that the one to the right as you went in was separate, and the one to the left also?
- A. No; this side, the right side, that is where you go in through the entrance, and the left-hand side of that shower is where the bulkhead crosses right across by the two of them.
- Q. I would like to know when it was the steamer was laid up at the time you were overhauling her?
- A. That was the 15th of May; we arrived on the 13th and the ship was taken to the Union Iron Works, I think, on the 15th of May, and we started out again on June 1st, this year. [463]

### Testimony of S. W. Jamieson, for Claimant.

- S. W. JAMIESON, called for the claimant, sworn. Mr. CAREY.—Q. Where do you reside, Mr. Jamieson? A. Glendale, California.
- Q. Were you a passenger on the "Great Northern" at the time Mr. Hutchins claims he was hurt in a shower-bath on the 18th of February, 1916?
  - A. I was.
- Q. What room did you have on the ship, do you remember? A. Room 345.
- Q. Where is that with reference to the shower-bath on the "C" deck?
- A. It is across the passageway, and about, I should think, 50 feet forward.
  - Q. Did you have occasion to use the shower-bath?
    A. I did.

Q. Where were you going when you were aboard the ship at that time, from what place to what place?

A. From San Francisco to San Pedro, to Hilo, and to Honolulu, and back to San Francisco.

Q. You returned on the ship?

A. I did—not on that trip; the next succeeding trip.

Q. Where did you lay over? A. Honolulu.

- Q. Did you know Mr. Hutchins, the libellant in this case? A. I met him on ship board.
  - Q. Going or coming? A. Going.
  - Q. Before or after his accident?
  - A. I met him before his accident.
  - Q. Did you see him afterwards? A. I did.
  - Q. Did he tell you he was hurt? A. He did.
- Q. You say you used this shower-bath. I wish you would describe the shower-bath as fully as possible as it was on the 18th of February, 1916.
  - A. You mean the entire bath-room?

Q. Describe the bath-room, and the shower in the bath-room. [464]

A. The bath-room is off the passageway that runs lengthwise of the ship. There is a door that leads into the bath-room, opening in, and there is a very high threshold that you have to step over to get into it. In the bath-room were two shower-baths, some washstands and places for towels and one thing and another. The shower-baths were two compartments, about the ordinary size of a shower-bath, with overhead showers, curtains, a valve at one side for mixing the water to the proper temperature, or

turning it on or off, and on the open side there was a sill raised from the main floor of the bath-room I should say approximately five inches, or such a matter; the three walls of this shower were of marble slabs and the bottom was some sort of tile or Chinaware; between the two shower-baths was a door which led into some sort of heating arrangement for the water supply; the light in the bath-room was an overhead light, and owing to the light-colored paint and flooring in the bath-room, the light was diffused all over.

- Q. Did you notice whether any facilities were provided for taking hold of to prevent slipping or falling, and if so describe them.
- A. I could not state whether or not there was anything further than the valve, that being all I had occasion to use.
  - Q. You mean on the pipes?
  - A. The valve on pipes.
- Q. I wish you would look at the photograph, Claimant's Exhibit No. 3, state whether or not that correctly represents the bath as it was at that time.
  - A. To the best of my recollection it does.
- Q. I call your attention to the edge of the marble slab at the right hand of this picture. Will you state whether or not that was there at the time?
  - A. It was.
- Q. What would you say as to whether or not it would be practicable [465] for a person using the bath to take hold of that to steady himself if he found it necessary to steady himself?

- A. Yes, a person could so steady himself on so going into the bath.
- Q. Are the valve handles you spoke of in your testimony shown in this exhibit, and if so point at what place.
- A. The valve handle is on the left-hand wall as shown in this picture, about half way up.
- Q. Now, will you state whether or not you had any difficulty in using this bath? Did you slip or fall?
  - A. I did not.
- Q. What would you say as to whether or not there was danger of falling in using the bath?
- Mr. CATHCART.—Objected to as leading and calling for the conclusion and opinion of the witness.
- A. I should say that there was no more danger in using this shower-bath than any other shower-bath that I have ever used.
- Mr. CAREY.—Q. Could you suggest any precautions that should be taken that were not taken to make this bath more safe than it was?
- Mr. CATHCART.—Objected to as calling for an opinion of the witness.

Mr. CAREY.—I will withdraw the question.

- Q. Did you notice at that time this rod at the top of the bath? A. Yes.
- Q. What is the fact as to whether it was there at the time mentioned?
  - A. There was a rod there at the time.
- Q. Did Mr. Hutchins tell you how this accident happened?
  - A. All that I recall is his telling me that, in reply

to my asking him how he had hurt his shoulder, that he had slipped and fallen, stepping into a showerbath. [466]

- Q. Do you remember a mock divorce trial that was carried on by the passengers of the ship on February 18, 1916?A. I do.
  - Q. Do you remember who presided at that trial?

A. Mr. Hutchins took the part of the judge and presided.

#### Cross-examination.

Mr. CATHCART.—Q. Did you use the shower frequently that trip?

- A. As I remember it, at least three times.
- Q. On the way over? A. On the way over.
- Q. And you did not, on entering it, catch hold of this slab to steady yourself, did you, at any time?
- A. As I recall it, I never had occasion to catch hold of anything on using the shower-bath.
- Q. This rod that you noticed, or about which you have spoken, is the rod on which the curtain runs that shuts in the bath from the room, itself?
  - A. Yes, there is a curtain on the rod.
- Q. You did not notice the handle that is shown on the photograph there at all, did you?

A. I could not say as to whether that was or was not there at the time. I had no occasion to use it.

- Q. You did not notice it?
- A. No, I did not particularly notice it.
- Q. You saw the valve?
- A. I did; I used it.
- Q. In turning on the water? A. Yes.

- Q. That is the only reason—that is the only purpose for which you used it, turning on the water?
- A. Turning it on and turning it off, changing the temperature.
  - Q. What is your business, Mr. Jamieson?
  - A. I am a rancher.
  - Q. In Glendale? A. At Glendale.
- Q. You became acquainted with Mr. Hutchins on the trip down? A. On the trip down.
- Q. Did you come back on the "Great Northern" on its next trip? [467]
- A. You mean by the next trip, the return trip of the boat?
- Q. No, not the round trip, but the next trip after that?
  - A. The next trip after that, I did.
- Q. And used the shower-bath on that return trip, did you? A. I did.
- Q. Did you use these two showers, or confine your-self to any particular one of them—there are two opposite each other.
- A. I could not state positively whether I used both or only one.
- Q. Neither on the trip going or on the trip returning did you notice the handle on the rear slab?
- A. It might have been there and I would not notice it.
  - Q. I am asking you whether you did notice it.
- A. I could not state as to whether or not it was there.

- Q. And you did not notice the handle on either the trip over or the trip back? A. Not specifically.
  - Q. Not at all? A. No. [468]

### Testimony of Charles Wall, for Claimant.

CHARLES WALL, called for the claimant, sworn.

Mr. CAREY.—Q. Are you an officer on the "Great Northern" steamship? A. Yes.

- Q. What officer? A. Chief officer.
- Q. How long have you been chief officer on that ship?
  - A. Since last January—January, 1916.
- Q. Were you chief officer on that ship in February, 1916? A. Yes.
- Q. Do you know the condition of the shower-bath on the "C" deck on February 18, 1916?
  - A. I do, yes.
- Q. What was its condition with reference to its condition at the present time; has there been any change in it? A. Absolutely none.
- Q. Now, will you describe it as it was on February 18, 1916?
- A. The bath-room extends across the ship, from one passageway to the other, with a door leading into it from either passageway, and the two showers are placed in the after corner of the bath-room, one at each side of the bath-room, with a passageway between them; the shower is constructed of three marble slabs, one in each corner of the room, and one extending at right angles to the bulkhead or parti-

(Testimony of Charles Wall.)

tion of the bath-room as it were; a door leading into a heating-room between the two showers. There is a tray on the floor of the shower extending from the floor probably about five to six inches, outside measurement; a hand-grab, hand-hold, at the rear of the shower, approximately five feet from the floor; also a curtain rod suspending a curtain at the entrance of the shower, constructed of heavy brass. Then to the left, facing the rear of the shower, are the water-pipes and valves for turning on the water and adjusting the water according to requirements.

- Q. I wish you would look at the photographs, Claimant's Exhibits [469] 1, 2, and 3, and state whether or not those correctly represent the shower in question? A. They do; yes.
- Q. The left-hand side of the picture, Claimant's Exhibit No. 2, appears to be a door-knob; will you state whether there was such a door-knob there?
- A. Yes, and still there in the same position and same condition.
- Q. Would it be practicable for a person desiring to use the bath to hold on to that door-knob if he desired to do so?

Mr. CATHCART.—Objected to as being leading and calling for the conclusion and opinion of the witness.

A. It would.

Mr. CAREY.—Q. On the right-hand side of this picture appears to be the edge of a marble slab; was that there at the time spoken of? A. Yes.

Q. What would you say as to whether or not that

would afford means of holding on, in taking a bath? Mr. CATHCART.—The same objection as to the last question.

A. Yes, it would be possible to hold on to it.

Mr. CAREY.—Q. Describe that slab with reference to its location and its convenience for the purpose of taking hold of it.

A. Well, in stepping into the shower, it seems to me the first thing that a person would take hold of; naturally, a man will put his hand up and touch that slab or hold on to it in stepping into it; I think that nine men out of ten would do that without any conscious effort or thinking about it.

Q. On the left-hand side of this picture appear to be some perpendicular pipes; will you please describe them, especially with reference to their location and practicability as a means of taking hold of it getting into or in using the baths?

A. These water-pipes are about the height, we will say, of five [470] feet, I imagine, from the floor, and quite easy to be taken hold of in entering the bath; in case of a man losing his balance, I think it would be the first thing he would catch hold of with his left hand.

Q. In this same exhibit, I call your attention to what appears to be a handle fastened to the marble wall directly opposite the entrance to the showerbath; will you state whether that was there in February, 1916? A. Yes, that was there.

Q. Now, describe that handle?

A. It is made of heavy bronze or brass and fas-

tened on to the rear marble slab with heavy screws, for the purpose of giving a secure hold.

- Q. How was this bath-room lighted?
- A. By overhead lights from the ceiling.
- Q. What was the state of the light, as to whether or not a person using the bath would have light to see and to use the bath conveniently?

Mr. CATHCART.—The same objection, as being leading and calling for the opinion and conclusion of the witness.

A. Sufficient light; it would give him plenty of light in all corners, and all over the room.

Mr. CAREY.—Q. There was no rubber mat on the bottom of this shower-bath?

A. Not at that time, that I know of; as far as I saw, none.

Q. Was a rubber mat ever used in these shower-baths?

Mr. CATHCART.—Objected to as being leading and calling for the opinion and conclusion of the witness, and no proper foundation laid.

A. Not that I know of.

Mr. CAREY.—Q. Did you ever see any rubber mats used in such shower-baths? [471]

Mr. CATHCART.—Same objection.

A. No.

Mr. CAREY.—Q. About how many people used these shower-baths on the ship?

A. That I have no means of knowing, not being directly in touch with the passengers.

Q. Have you ever heard any complaint that they

are unsafe, or not properly constructed?

- A. No.
- Q. What are your duties as first officer, with reference to inspecting and examining the shower-baths?
- A. We have our inspections every day, and if we find anything wrong, or equipment broken, we have it tended to, and report it to the head of the proper department.
- Q. Have you ever found anything wrong with this bath, or made any report concerning it?
  - A. No.
- Q. Have you ever noticed anything that led you to think this bath was dangerous in any respect?
- Mr. CATHCART.—Objected to as being immaterial, irrelevant and incompetent, leading, calling for the opinion and conclusion of the witness.

A. No.

Mr. CAREY.—Q. Have you ever had occasion to report concerning any defect in this bath?

Mr. CATHCART.—Same objection.

A. No.

Mr. CAREY.—Q. Now, as first officer of the ship, will you state whether your duties include having a log kept which would show the weather conditions from day to day on the voyage of the ship?

- A. Yes.
- Q. Was such a log kept on this ship? A. Yes.
- Q. Just tell how the log is kept.
- A. It is written up at the end of a watch, the regular watches.
  - Q. Who writes it up?

- A. The chief officer, or one of the officers [472] detailed by him to write it up.
- Q. You are chief officer, and you either write it or have someone do it under your direction?
  - A. Yes.
- Q. Where is the first entry made with reference to the weather conditions—what book is it kept in?
  - A. It is kept in the pilot-house log-book.
  - Q. Is there more than one log-book?
  - A. Yes, there is the mate's log-book, besides that.
  - Q. Which is the ship's log, the final entry?
  - A. That is the mate's log-book.
- Q. Now, was a log kept of the weather conditions on February 18, 1916? A. Yes.
  - Q. Who kept it that day?
  - A. The third officer.
  - Q. What was his name? A. G. Grundy.
- Q. Would you be able to identify those books if shown you? A. Yes.
- Q. Which is the first book in which the entry is made on that date?
  - A. This is the official log-book.
- Q. You have an official ship's log of that date, have you?
- A. Yes, this is it right here; February 18, 1916; this is supposed to have been the original entry; the other is a scratch log kept in the pilot-house by the officer; that is the official writing up.
- Q. Now, this mate's log-book is opened to the date February 18, 1916, is it? A. Yes.
  - Q. Whose handwriting are these entries in?

A. Mr. Grundy's, the third officer.

#### Cross-examination.

Mr. CATHCART.—Q. You have no duties with reference to the bath-room, have you?

A. No, nothing, outside of inspections. [473]

Q. And the inspection; that is, going through the ship to see if there is anything out of order or wrong with the equipment? A. Yes.

Q. Did you make inspection February 18?

A. Yes.

Q. Do you remember it distinctly, or are you speaking because—

A. No, I remember it distinctly, because it is done every day.

Q. Do you remember it because it is done every day, or do you remember doing it particularly on that day?

A. Yes, I remember doing it particularly on that day.

Q. What time of day was it you made the inspection? A. Usually around eleven o'clock.

Q. On that day? A. Yes.

Q. Eleven o'clock that day? A. About eleven.

Q. What time did you get into the bath-room that day?

A. It might have been between eleven and twelve.

Q. Did you go into the bath-room? A. Yes.

Q. Into the shower-bath?

A. I took a look in there.

Q. Just opened the door and looked in?

A. Opened the door and looked in.

- Q. You have talked this matter over with the captain, I suppose, haven't you, about the case?
  - A. Yes, I may have at different times.
  - Q. Don't you remember to have done so?
  - A. Yes, I did.
- Q. And compared notes with him with reference to how the bath-room was equipped, did you not?
  - A. I could not say that I did, no.
  - Q. Didn't you talk about the handle being there?
  - A. Not that I can recollect.
  - Q. You don't recall? A. No.
- Q. Did anybody ever ask you about the handle being there on February 18, 1916? A. No.
- Q. Did you ever tell anybody the handle was there on February [474] 18, 1916, before you heard of this case? A. No.
- Q. Isn't it a matter of fact that that handle was put on subsequent to this accident? A. No.
  - Q. Not true? A. Subsequent, no.
  - Q. Afterwards?
- A. No, it was not; it was there the day before the accident.
- Q. Now, this slab, that you say would afford a support, if a person was holding on to it, he would have to extend his fingers on one side and his thumb on the other, would he not? A. Yes.
- Q. He would have no place on the slab by which he could get a grip, could he? A. Not very well.
- Q. If his foot should slip out under him and he should fall backward, his hand would slide right off that slab, would it not?

  A. It might.

- Q. Wouldn't it?
- A. It might have done so, I could not say.
- Q. Don't you know that it would? There was nothing that he could hold on, was there?
  - A. There is a curtain rod.
- Q. I am speaking of the slab on the right-hand side as you go in; how could he hold on if he fell backwards?
  - A. I am sure I don't know; I think I could hold on.
  - Q. You think you could? A. Yes.
  - Q. The slab is smooth marble, isn't it?
  - A. Smooth marble.
- Q. Now, if a person falling should catch hold of the hot water pipe it would scald and burn his hands, wouldn't it?
- A. The hot water pipe is inside of the other two; they naturally would catch the cold water pipe first.
- Q. Answer my question, Chief; if he did catch hold of the hot-water pipe it would scald his hands and burn them, would it not?
  - A. I imagine it would, yes.
- Q. The three pipes are so placed that in reaching out one might [475] catch hold of any one of them?
- A. In standing on the outside and stepping in, it is natural to eatch the first pipe at hand instead of passing by the first two pipes and catching the inside one; you naturally eatch the first one at hand.
- Q. The three pipes are close up against the wall, are they not? A. Yes.

- Q. So that you could not get your hand in around one pipe?
- A. Yes, there is space enough for that; there is space enough for that; there is space enough to get past, to get the hand around the pipe.
- Q. In speaking of catching hold of the pipe, you are going on the theory that one catches hold of it in entering. Would you reach out and catch hold of it on entering the bath?
  - A. If a person lost his balance.
- Q. Your idea is that if a person entering that bath, stepping into it, should lose his balance and fall over backwards, he could reach out and catch hold of the pipe? A. He could, yes.
- Q. How far inside the bath are these pipes? What is the distance from the edge of the slab?
- A. Probably about 12 to 15 inches; I don't think more than that—12 inches, most likely.
- Q. Now, that knob—that is a door-knob that turns, is it not? A. Yes.
- Q. If a person entering the bath should slip and fall backwards, in catching hold of the knob the knob would turn and the door open right on them?
- A. No, not necessarily, unless he twisted the knob around; I don't see how it would open, just by catching hold of it.
  - Q. You don't think so, if a person were falling?
  - A. No, likely not. [476]
- Q. Have you tried catching hold of this knob at all? A. I have, yes.

- Q. And falling backwards, to see if your grip would hold?
- A. I have not tried to fall backwards; no necessity to try and fall backwards.
- Q. In other words, when you speak about catching hold of this slab, you mean that a person could put his hand on it to steady himself as he entered into the bath? A. That is my idea, yes.
- Q. And the same way you speak in reference to the door knob?
- A. Yes; it might save a person losing his balance, by grabbing it.
  - Q. The door-knob? A. Yes.
  - Q. Providing it didn't turn when he did?
- A. It might turn, I don't know; that is a possibility.
- Q. That door opens inside into the bath-room, does it not?
- A. Yes, it opens into the bath-room—I would not be sure about that; I think it does; I think it opens into the bath-room.
  - Q. You say that there are overhead lights there?
  - A. Lights in the ceiling, or light in the ceiling.
  - Q. It is one light, isn't it?
- A. I am not sure whether there is more than one, or two; I am not sure about the number of lights.
  - Q. Electric light?
  - A. Yes, electric lights.
  - Q. What candle-power, do you know?
  - A. Well, maybe 40 or 60; I am not sure which.

Q. You don't know how many there are?

A. I would not say offhand whether there was one or two there. [477]

## Testimony of George Grundy, for Claimant.

GEORGE GRUNDY, called for claimant, sworn. Mr. CAREY.—Q. Are you an officer of the steamship "Great Northern"? A. Yes.

Q. What officer? A. Third officer.

Q. How long have you been in that vessel?

A. July 1, 1915; previous to that I was fourth officer.

Q. State whether or not it was part of your duty as third officer to keep the log-book of that ship.

A. I wrote the log at the expiration of my watch, the rough log or bridge log; four hours in the mornin and four hours in the evening; at the expiration of the day I take the log and copy it into the official log-book.

Q. This log-book which was produced here by Mr. Wall, the first officer, marked on the outside, "Log-book of the Great Northern on Voyage from December 6, 1915, to March 2, 1916," is opened at the page dated February 19, 1916. Will you state whether or not the entries on that page are in your handwriting?

A. Yes, they are.

Q. When did you make those entries?

A. On the same day, February 18.

Q. Now, how was observation taken of the weather conditions from which observation entries in the log-

book are made—how do you take the weather observations?

- A. Well, we observe the weather as it is in our watch, any wind, direction of the wind, sea, any swell, rain.
- Q. What part of the ship are you on during your watch? A. On the bridge.
- <sup>e</sup> Q. Now, on February 18, there are entries in the log-book under the column "Remarks." State whether or not those are in your [478] handwriting? A. Yes, that is my handwriting.
- Q. What is the fact as to whether or not those are a correct record of the condition of the weather on the date named? Is this a true statement of the conditions on that date?

A. It is a true statement.

Mr. CAREY.—I wish to offer in evidence the entries in the log-book as of date February 18, 1916, and will ask consent of counsel representing the libellant to withdraw the original book and permit the reporter to make a copy of this page, the same to stand in lieu of the original, for the convenience of the ship and its officers?

Mr. CATHCART.—We have no objection to the reporter making a transcript of the page.

(The transcript of the page is marked Claimant's Exhibit No. 4.)

Mr. CAREY.—Q. I will ask the witness some questions in explanation. I will ask you to explain the figures in the column headed "Time by clock." What are those figures? What do they mean?

- A. Those figures are the time by the watch, the change of the watch.
  - Q. The first one is "4"; is that four o'clock A. M.?
  - A. In the morning.
  - Q. The second one is 8; is that eight o'clock A. M.?
  - A. Yes.
- Q. In the column headed "Time on course, hours, minutes" are certain figures. What do those figures represent?
- A. They are the number of hours the ship ran on the course that particular watch.
- Q. In the column headed "Remarks" are entries apparently relating to the weather. Are these the weather entries that you were speaking of a few moments ago in your testimony? A. Yes. [479]
- Q. Now, how often are those entries made in the log-book? A. At the end of each watch.
  - Q. That would be every four hours.
  - A. Every four hours.
- Q. What was the condition of the weather on that date, between four o'clock and eight o'clock A. M.?
- A. Fine and clear weather; light breeze, smooth sea, heavy northwest swell.
- Q. What was the condition of the weather between eight o'clock A. M. and 12 o'clock M.?
- A. Fine weather, moderate breeze, small sea, moderate swell.

Cross-examination.

Mr. CATHCART.—Q. You are reading now from the exhibit? A. Yes.

Q. You were going from San Pedro to Hilo?

- A. Yes.
- Q. How many days out from San Pedro was the 18th of February, 1916?
  - A. I don't just remember offhand; it is in the book.
- Q. Where did you get the figures and letters showing the pilot-house compass and the standard compass?
- A. They are two different compasses; the course is set on the standard compass and the steering compass is compared with the standard compass.
  - Q. Who sets the course on the standard compass?
- A. The officer on watch under the direction of the captain.
- Q. Leaving San Pedro, you first make a northwesterly course, do you, and then swing more to the southerly? A. Yes.
- Q. And at noon time you take the latitude and longitude entered here? A. Yes.
- Q. I notice under the column headed "Wind," "S. W. 2, S. 4, S. W. 4, N. N. W. 3." What does that figure mean after the letters?
  - A. That is the force of the wind, from zero to 10.
  - Q. Per hour?
  - A. No; 10 is a hurricane; zero is calm.
  - Q. 10 is the maximum? A. Yes. [480]
  - Q. What do the letters "B. C." mean?
  - A. Clear weather.
  - Q. What does that come from?
  - A. That is a hydrographic term.
- Q. The swell on that day was no heavier than it had been for previous days? A. No.

- Q. No heavier? A. No heavier.
- Q. The sea was about the same?
- A. About the same, yes.
- Q. It had not subsided at all?
- A. It had not subsided.
- Q. Just about the same swell from the time you got well out into the ocean until you reached Hilo?

A. Yes. [481]

## Testimony of W. B. Lowenthal, for Claimant.

W. B. LOWENTHAL, called for the claimant, sworn.

Mr. CAREY.—Q. Where do you reside, Mr. Lowenthal?

- A. In San Francisco.
- Q. How long have you lived in this city?
- A. 5 years.
- Q. What is your business?
- A. Grain and bean business.
- Q. Were you a passenger on the voyage of the steamship "Great Northern" from San Francisco via San Pedro to Hilo and Honolulu, leaving San Francisco February 14, 1916?
  - A. February 14; yes.
- Q. Do you remember what room you occupied at that time?
  - A. I think 323, if the 300's are on the "C" deck.
- Q. Did you have occasion to use the public shower-bath on the "C" deck? A. Yes.
  - Q. How frequently? A. Every morning.
  - Q. Did you use it on February 18, 1916?

- A. Yes.
- Q. State whether or not your wife traveled with you on that trip. A. She did.
  - Q. Did your wife use the shower? A. She did.
  - Q. How frequently?
- A. I think every morning; she may have missed one morning, but of that I could not be certain.
- Q. Did you experience any difficulty in using the shower, either on the 18th or any other day, on that voyage?
- Mr. CATHCART.—Objected to as being leading and calling for the conclusion and opinion of the witness.
  - A. I had no difficulty.
- Mr. CAREY.—Q. Will you please describe the shower-bath as you remember it, with particular consideration of what facilities, if any, existed at that time for taking hold and preventing slipping or falling down in making use of the bath?
- A. To the best of my knowledge, there was no rod or brace to hold onto in the shower; there were just the three walls and the [482] curtain in front; that is the curtain rod.
- Q. Let me attract your attention to the photographs in evidence here as Claimant's Exhibits Nos. 1, 2 and 3, in which are shown a handhold on the marble slab at the back of the bath. Have you any recollection as to whether that was there when you used it?

  A. I don't remember it.
- Q. Please notice in these photographs along the right-hand side of the shower-bath what appears to

(Testimony of W. B. Lowenthal.) be the edge of the marble slab; was that there at the time when you took your baths?

A. Yes, that was there.

Q. What would you say as to whether or not that afforded an opportunity for taking hold, if you so desired?

Mr. CATHCART.—Objected to as calling for the opinion and conclusion of the witness.

A. I think that would assist you in supporting yourself.

Mr. CAREY.—Q. Now, these pipes shown more to the left of the picture are the water-pipes, are they not? A. Yes.

Q. Were they there at the time you took your baths? A. They probably were.

Q. What would you say as to whether or not they afford an opportunity to take hold of if you so desire?

Mr. CATHCART.—The same objection as to the previous question.

A. I should not think they would be any advantage.

Mr. CAREY.—Q. I notice in Claimant's Exhibit No. 2 a door-knob at the left-hand side of the showerbath. Do you remember that being there at the time? A. I do not.

Q. You have no recollection of that?

A. I have not.

Q. Now, what was the condition of the bath-room in which this shower was located, as to whether or not it was lighted up or dark? [483]

A. It was lighted up.

Q. What degree of light was there at that time, as to whether or not it would be practicable to see the condition of the bath?

Mr. CATHCART.—Objected to as calling for the opinion of the witness, the latter part of the question

A. I always found sufficient light for all purposes.

Mr. CAREY.—Q. You referred to a rod on which the curtain runs at the top or front of the bath; will you describe that rod a little more fully?

A. That was a rod on which the curtain hooks, sliding back and forth; so it was possible to pull the curtain across the front of the shower.

- Q. Is that the rod shown at the top of this picture?
- A. Yes.
- Q. About what diameter of rod, if you can tell?
- A. I don't remember; I should say about an inch in diameter.
- Q. Do you remember whether you had occasion to hold onto this pipe or rod? A. I did.
- Q. Do you know Mr. C. J. Hutchins, the libellant in this proceeding?

  A. I do not.
  - Q. Have you ever seen him? A. Yes.
  - Q. Where did you see him?
  - A. On the steamer, and at Honolulu.
- Q. Do you remember a mock trial that was carried on on the night of February 18, in the lounge-room of the ship where the passengers were assembled?
  - A. I did not attend.
- Q. You were not present in the shower-bath room at the time Mr. Hutchins claims he had this accident?
  - A. I was not.

- Q. Did he say anything to you about the accident?
- A. He did not.
- Q. What would you say generally now as to whether or not this shower-bath appeared to be safe or dangerous? [484]

Mr. CATHCART.—Objected to as leading and calling for the opinion and conclusion of the witness.

Mr. CAREY.—I withdraw the question.

#### Cross-examination.

Mr. CATHCART.—Q. This slab of which you speak was the slab that formed one side of the shower, was it not? A. Yes.

Q. And one could only lay his hand along the slab with fingers on one side and thumb on the other; there was no way of getting a grip on the slab, was there? A. No.

Q. So that if a person having his hand on that slab, with his fingers on one side and thumb on the other should slip and fall backwards, his hand would just slide off the smooth marble, would it not?

A. I did not stand that way any fime that I held on to the slab, I faced out and held on with my hand this way (illustrating).

Q. But if a person facing in and entering the bath should have his hand laid along this slab, as I stated, then if he fell back he would slip off the smooth surface of the slab? A. It would be possible.

Q. Wouldn't it be the natural and only way that could happen, because he had no grip there to hold on to?

A. I should think so; yes.

Q. Suppose I am hanging on to the table like this

and my full weight is thrown back, I would have to have a very powerful grip in my hand to hold my weight, would I not? A. Yes.

- Q. Did I understand you to say that you held on to the pipes?

  A. The rod, the curtain rod.
  - Q. When you were in the shower?
  - A. Yes. [485]
  - Q. You did not hold on to the pipes at all?
  - A. No.
- Q. And there was no hand-grab or hold at the rear of the bath-room that you saw?
- A. Not that I saw; not to the best of my recollection now.
- Q. There was none; you did not hold on to that at all? A. I did not.

#### Redirect Examination.

Mr. CAREY.—Q. In taking your bath did you face outward toward the entrance of the bath?

- A. I did.
- Q. Then your back would be to the marble slab on which this hand-grab is shown in the picture?
  - A. Yes.

#### Recross-examination.

- Mr. CATHCART.—Q. You did not back into the bath, though, did you?
  - A. I don't think so; I don't remember.
- Q. While in the bath you worked the handle on the pipe to turn on the water, didn't you?
- A. Yes, I presume so; I do not usually turn on the shower before I get in.
  - Q. So that you would have an opportunity of ob-

(Testimony of W. B. Lowenthal.) serving all of the interior fittings of this shower-bath, would you not? A. I should think so.

- Q. You took a bath every morning?
- A. Every morning.
- Q. Did you come back on the steamer?
- A. I did not.
- Q. When did you return?
- A. On the "Manoa," three days later. [486]

## Testimony of C. S. Mills, for Claimant.

- C. S. MILLS, called for the claimant, sworn.
- Mr. CAREY.-Q. Mr. Mills, where do you live?
- A. San Francisco.
- Q. Are you one of the officers of the Great Northern Steamship Company? A. Chief steward.
  - Q. How long have you held that position?
  - A. Since August 10, 1915.
- Q. Will you state whether or not as chief steward you have general supervision and direction of the baths on board that ship and particularly the shower-baths?
- A. Everything pertaining to the catering and room department, staterooms, baths, toilets.
- Q. What opportunity have you had to know the condition of the shower-baths on the C deck?
- A. Well, I have every opportunity by making an inspection of every shower and toilet, as many as sometimes five or six times a day at sea, and also the inspection with Captain Ahman at 11 o'clock when I go to the bridge and we make a tour of the

ship, entering all staterooms, unoccupied and showers, baths and toilets.

- Q. Will you state whether or not that inspection was carried on from day to day during this voyage that left San Francisco February 14, 1916, and ran over to the Islands?
- A. Carried on every day except Sunday and entering port.
- Q. Have you any particular remembrance of the dated February 18, 1916? A. No.
  - Q. Did you know the libellant, Mr. Hutchins?
- A. Well, not personally; I just know him the same as I know any other passenger.
  - Q. You saw him on board on that voyage?
  - A. I saw him on board. [487]
- Q. Did you hear him make any complaint about having had an accident in the C shower-bath?
- A. I had no information about it at all; Doctor McAdoy informed me.
  - Q. Who was Dr. McAdoy?
  - A. The ship's surgeon.
  - Q. About what time did he inform you?
  - A. I have no recollection.
- Q. That is to say, whether it was the same day that the accident happened or some other day?
  - A. I have no recollection.
- Q. You say you go in and out of these shower-baths on the ship daily 5 or 6 times? A. Yes.
- Q. Now, I call your attention to these photographs, Claimant's Exhibits 1, 2 and 3, and will ask you to examine them and to state whether or not those are

correct representations of the shower-bath in question as it was on February 18, 1916. A. Yes.

- Q. For the purpose of this record will you please describe the bath-room in which this shower is contained, describe the shower, describe the lighting system, describe the facilities afforded, if any, for passengers making use of the baths?
- A. Well, the baths are located about amidships on the C deck, with entrance on either passenger alleyway starboard and port side; the two baths are about the center on the after part of the room, and to go into the baths you face the door of the heater-room, and to go in to take the shower you would have to face the back of the shower-bath, and step over a slight ledge maybe about 4 or 5 inches high to the receptacle; at the after end, which is the left-hand side entering on the port side, the pipes from which you control the flow of the water are situated and on the shower to the left the pipes are on the right-hand side of you, and an open slab is vice versa [488] it is on the left on one shower and right on the other. Back of the bath there is a hand-grab and a curtain rod with a curtain which runs on rings, to keep the water inside the bath. The lighting, I am not sure whether there are three or one lights, but we use 60candle power globes in there and there is always lots of light; the marble slab does not reach to the top of the deck, and the light flows right over in each room.
- Q. In entering the bath on the port side what facilities would a passenger have to take hold of?
  - A. He would have the slab to the right of him and

the curtain on the left of him. I see in the picture the curtain is shown to the right, but it is nearly always hanging on this side because when a person gets out he will pull the curtain away from him to step out of the bath; when we have it ready for inspection the curtain is always by the three pipes, so that when you get in there you could grab the curtain, which would be ample in my idea to save anybody from slipping. Then you have the marble side; there are three marble slabs, and you have the marble slab to the right of you, if you are entering the port side one, and the marble to the left of you if you are entering the starboard side there, so that it gives a curtain and a marble slab and then also at the back of the bath they have got the grab-rail.

Q. The latter is something in the nature of a metal handle bolted to the wall?

A. I don't know what kind of metal it is; I think it is called Potosi metal, which they use to take the place of silver, some kind of white metal, I don't know just what it is; I am not a mechanic in regard to metal.

Q. As shown on those photographs there is a series of three [489] pipes at the left of the shower-baths; what would you say as to whether or not those are so located as to afford an opportunity to take hold of?

Mr. CATHCART.—The same objection as heretofore, calling for the opinion and conclusion of the witness.

A. A man could take hold of them; if I was falling

I would grab for the nearest thing in reach.

Mr. CAREY.—Q. Is there any rubber mat provided in those baths?

A. No.

Q. Why not?

Mr. CATHCART.—I object to that upon the ground no foundation has been laid.

A. I did not think it was correct to have a mat in the bath-room.

Q. Why?

Mr. CATHCART.—The same objection.

A. Not sanitary.

Mr. CAREY.—Q. If any accident should happen in the use of the shower-baths on the ship to whose attention would that be called in the natural course of business on the ship?

A. The purser and myself; if it happened inside of the staterooms or showers or baths or on deck it would be reported to the deck department, the chief officer or the captain.

- Q. Have any complaints been made to you about these shower-baths? A. No.
- Q. Have you traveled on other ships than the "Great Northern"? A. Yes.
  - Q. How much experience have you had at sea?

A. 12 or 13 years. [490]

#### Cross-examination.

Mr. CATHCART.-Q. On the Pacific Ocean?

A. On the Pacific most of the time, yes.

Q. You are an American? A. No, English.

Q. Was the question of mats ever discussed by you with anybody before this accident? A. No.

- Q. Never brought up in any way, was it?
- A. No.
- Q. This curtain that you speak of hanging there, the purpose of that is to keep the water from splashing out, isn't it? A. Yes.
- Q. And the purpose of the pipes that are there is to afford a supply of water to the baths, is it not?
  - A. Yes.
- Q. And neither the curtain nor the pipes are put there for the purpose of affording a hand-grab or anything like that, are they?
- A. They are regular ship's equipment appertaining to the shower-bath but could be used for that purpose.
- Q. If anybody slipped they would catch hold of anything, wouldn't they?
  - A. Catch hold of anything.
- Q. And if they caught hold of that curtain and it ran along the pole, they would run along with it?
- A. Yes, but he would not slip and break his neck though.
  - Q. He might, might he not? A. Yes.
- Q. If he caught hold of that hot steam-pipe he would burn his hands pretty badly, wouldn't he?
  - A. He would not hold it long.
  - Q. He would not hold it long?
  - A. No. He might get a blister.
- Q. That would not afford him any help at all then, if he was falling?
- A. If he caught hold of the hot one it would not, [491] but there are two others there; a man would

not be necessarily apt to grab the hot one.

- Q. The only provision for holding there is that handhold or grab on the rear slab, isn't it?
  - A. Outside of the equipment, yes.
- Q. What equipment is there around there for the purpose of supporting anybody or for the purpose of holding on there? A. The grab-rail.
- Q. That is the only thing that is there for the purpose of support? A. The grab-rail?
- Q. Did you say anything about holding on to this marble slab?
- A. Yes. A man, if the ship was in motion, was rolling a little, would naturally steady himself on that slab or the curtain.
- Q. But it would not afford any grab that a man could hold on to if he fell back?
- A. It would not afford a grab; it would afford enough protection that a man would not lose his footing, by using those precautions, holding on to something.
  - Q. That is your opinion? A. Yes.
- Q. You have talked this matter over I suppose with the other officers on the ship, haven't you?
  - A. Yes.
- Q. When did you first speak about the hand-grab or hold?
- A. I think after the first trip we made to Honolulu in November.
  - Q. You spoke about it? A. Yes.
  - Q. To whom?
  - A. I don't know how the conversation come up

but we were talking about putting them on, and we put them on.

- Q. With whom were you talking?
- A. Mr. Blair and also Mr. Wiley and maybe somebody else was there; I don't know.
  - Q. Who is Mr. Blair?
  - A. Mr. Blair is our Port Steward.
  - Q. Here in San Francisco?
  - A. In Portland, Oregon. [492]
  - Q. Who is the other gentleman, you say?
  - A. Mr. Wiley.
  - Q. What is he? A. Marine Superintendent.
  - Q. At Portland? A. San Francisco.
- Q. So that this hand-grab was put on in November of 1915?
- A. No. I don't know when it was put on. It was put on sometime after the first trip. I think it was in January, if I remember right.
  - Q. But you are not sure?
- A. No; we got back around about Christmas time or New Year's, and it was put on somewhere around there.
- Q. It was not on then when the ship came from Cramp's Yards to the Pacific? A. No.

Redirect Examination.

Mr. CAREY.—Q. How frequently are shower-baths used on the ship?

Mr. CATHCART.—I object to this as not being redirect examination.

A. Well, it is according to the weather conditions and climate; on the coast we don't have but very

little use for them, maybe half a dozen or a dozen times during the trip, but on the Honolulu run they are kept going from 5:30 or 6 o'clock in the morning up till 9 o'clock, a constant stream.

- Q. How many shower-baths are taken daily on the Honolulu trip?

  A. I have no record of how many.
  - Q. Can you give approximately the number?
- A. Approximately I should judge 30 or 40 on each deck; maybe 50.

#### Recross-examination.

Mr. SMITH.—Q. When did you say these hand-grabs were put on?

A. I believe in January.

Q. What year? A. This year. [493]

Mr. CATHCART.—Q. Where were they put on?

A. Put on in San Francisco.

Q. Do you know by whom?

A. By Muir & Symon. I O. K.'d the requisition and the bill and I think it has all been paid for.

Mr. SMITH.—Q. Have you that bill?

A. I believe I have a copy of it. I keep in my records all those things.

Mr. CATHCART.—Q. The handle is white?

A. White metal.

Q. It is not bronze or brass?

A. It is a white metal, as far as I know. [494]

## Testimony of W. J. Tomlin, for Claimant.

W. J. TOMLIN, called for the claimant, sworn.

Mr. CAREY.—Q. Will you please state your full name? A. William John Tomlin.

- Q. Where do you live?
- A. 1140 Regent Street, Alameda.
- Q. What is your business? A. Shipfitter.
- Q. What firm are you connected with?
- A. Muir & Symon.
- Q. What is their business?
- A. Shipfitting, ship repairing, machine work.
- Q. Did you put some handles or hand-grabs in the shower-baths on board the "Great Northern" for that steamship company? A. I did.
- Q. Please look at the photographs Claimant's Exhibits 1, 2 and 3, and state whether or not you put on the handles that are shown on the marble slab at the back of the bath? A. Yes, I put them on.
  - Q. What time did you put those on?
  - A. Around January; my time-cards will tell that.
  - Q. January, 1916? A. Yes.
  - Q. Can you give the exact date?
- Mr. CATHCART.—We object to the witness being shown any papers in the matter.
- Mr. CAREY.—Q. By referring to your time sheet can you tell the exact date? A. Yes.
  - Q. What is the paper you hold in your hand?
  - A. That is the time-card—two time-cards.
  - Q. When were those time-cards made?
- A. They were made the evening of the finishing of the day's work, and turned into the office, the material used, to be charged up.
- Q. In whose handwriting are the entries on these time-cards? A. Mine. [495]
  - Q. What are the dates of these time-cards?

- A. The 24th and 25th of January.
- Q. 1916? A. Yes.
- Q. And the signature of W. J. Tomlin on these time-cards, is that your signature? A. Yes.
- Q. Now, just how did you make up these time-cards and for what purpose?
- A. At the end of the day you make up your time, the time occupied on the different jobs, whether aboard boat or ashore, so that they can charge up in the office the time and material on that job.
  - Q. You make them for your employer?
  - A. Yes.
- Q. Your employer is Muir & Symon, I believe you said? A. Yes.
  - Q. You turn them in at the close of each day?
- A. At the close of each day. If you lose the timecard you lose that day's work.
- Q. Just what is the object of making the time-card, the entries on the time-card?
- A. To charge the different material on each job you may be working on and the number of hours.
- Q. Now, by referring to these time-cards can you state the exact date when you put these handles on the back of the showers on the "Great Northern"?
  - A. Yes.
  - Q. On what date?
  - A. The 24th and 25th of January, 1916.
  - Q. You are positive about that date, are you?
  - A. Yes.

Mr. CAREY.—I will offer in evidence the two time-cards testified to by the witness and ask that

they be marked as exhibits.

(The time-cards were marked Claimant's Exhibits 5 and 6.)

#### Cross-examination.

Mr. CATHCART.—Q. Where did you get these time-cards? [496]

A. This gentleman got them at the office (pointing to Mr. Relf).

Q. You have not seen them since that date, have you?

A. No; we never see them after we turn them in.

Q. Have you any recollection of doing this work?

A. Oh, yes. I think I done it on both ships; I know I did it on the "Great Northern."

Q. On the "Northern Pacific" too?

A. I am pretty sure I done them all on the "Northern Pacific"; I done them all on the "Great Northern," I am sure.

Q. How many?

A. I could not tell you exactly the number of the handles I put on the showers; I don't know whether it is mentioned on there; I think it is just putting on the handles on all the showers; I know they were put on.

Q. This is written by you, all of it? A. Yes.

Q. And all on the evening of the day that you got through?

A. There are two separate days work there; at the close of each day you make them out and turn them in to the office.

Q. All written out at that time? A. Yes.

- Q. The letters on there "G N SS" mean what?
- A. "Great Northern Steamship."
- Q. And "N P SS"?
- A. "Northern Pacific Steamship."
- Q. On Exhibit 5 there is "Drilling marble in shower-baths, using electric drill 4 hours." That is "Northern Pacific Steamship," isn't it?
- A. Yes, that is Northern Pacific Steamship Company, but is "Great Northern."
- Q. Why have you got "N P SS," which would be the "Northern Pacific Steamship," down below?
- A. I don't know why that was put there; there must be an error in putting down the name of the ship; that is all.
- Q. According to your record there, you drilled the holes on [497] the "Northern Pacific Steamship," didn't you? A. On the "Great Northern."
- Q. According to your record you drilled these holes in the marble on the "Northern Pacific Steamship," didn't you?

  A. According to that, yes.
  - Q. That is your record?
  - A. What is the other one?
- Q. You put a baker's oven in the "Northern Pacific"?

  A. Yes, and rebricked the baker's oven.
- Q. On January 24, 1916, the same day that you drilled the marble in the shower-baths?
- A. That is the "Great Northern." Steering-gear, "Great Northern." All "Great Northern" work excepting that there; that is an error.
- Q. Didn't you put the handles on the "Northern Pacific" steamship, these grab-handles?

- A. Yes, I put some on, but not at this date.
- Q. How do you know?
- A. Because there must have been about a month elapsed.
- Q. Were not the handles put on the "Great Northern" later than they were put on the "Northern Pacific"?
- A. No, the "Great Northern" had them on first, because she was going to Honolulu.
  - Q. Have you got your cards for that?
  - A. Cards for the "Northern Pacific"?
  - Q. Yes.
- A. I have not got them; they would be in the office probably; in all probability they would be in the office.
- Q. Did you put that baker's oven on the "Great Northern"?

  A. That is the "Northern Pacific."
  - Q. That is a mistake too, is it?
- A. I do not believe both these ships were here on one day, the same day.
- Q. According to your record you put a baker's oven on the [498] "Northern Pacific" that same day, didn't you? A. Yes.
  - Q. And that is a mistake too, is it?
- A. No, I would not say that is a mistake. The contract number, 86, for putting in these ovens is on both. I left this out, in all probability here. That is not my writing there.
  - Q. Then "N P SS" is not your handwriting?
  - A. "Northern Pacific," no.
  - Q. Is "G N SS" your writing on exhibit 5?

- A. Not this.
- Q. You did not put that down at all?
- A. No; they added that on.
- Q. That is not your handwriting? A. No.
- Q. When you said it was all in your handwriting you made a mistake?

A. I did not look at these two small things; they check them, after checking them they made a mistake there. You see the contract numbers are both the same. The handles in the shower-baths, contract No. 86. That would be a day later than this, would it not?

- Q. This is the 25th?
- A. We were just finishing them up.
- Q. You don't remember the contract number, do you?

A. No, but we have to put down our contract number on there; there is a contract number written there, both the same number.

- Q. Do you know what the contract number was?
- A. 86.
- Q. Do you remember it?

A. No, I do not remember it, but it is in my handwriting there; I am positive the number is right; they would be both the same contract number; if they were different ships they would be different numbers.

Q. I see you have contract No. 84, on January 25, being exhibit 6?

A. That is a different department, different work, is it not?

Q. Different contract?

- A. Yes, probably a different department of the ship. [499]
  - Q. And 85 "Fastening Life Preservers"?
- A. That would be another contract; that is deck department; one would be the steward's department.
- Q. 86 is "Washers in ice-box, doors, butchershop"?
- A. That would be another contract number probably—no, that would be the steward's department; that might be 86 too, being the steward's department.
- Q. You have no independent recollection of the date on which you did this work on the "Great Northern" except as you gather it from here?
- A. That is all; I know it was around that time; I could not give you the date exactly.
  - Q. By "here" I mean this time-card?
- A. The time-card that was turned in that evening, yes.

#### Redirect Examination.

- Mr. CAREY.—Q. The name of the steamship company is the "Great Northern Pacific Steamship Company," is it not?
  - A. Great Northern Pacific Steamship Company.
- Q. Now, this entry on the time-card, exhibit No. 6, under date January 25, 1916, "No. 86, one hour, handles in shower-baths"—
  - A. —I was just finishing the job.
  - Q. Is that the date when you finished the job?
- A. That is the day when I was finishing the job; that is the last hour.
  - Q. Are these the handles shown on these photo-

(Testimony of W. J. Tomlin.) graphs exhibits 1, 2 and 3? A. Yes.

- Q. I wish you would just tell how you fastened them on the shower-bath?
- A. Back of this marble there is wood, 1½ inch sheathing, the next partition there of the bath; we drilled through the marble and put long screws clean through the marble into the wood on the other side. [500]
  - Q. How many screws on each handle?
  - A. Four on each handle.
- Mr. CATHCART.—I object to this as not being redirect examination.
- Mr. CAREY.—Q. What is the material of which this handle is made?
  - A. I believe it is brass-plated.
  - Q. Plated with silver?
  - A. Yes, silver-plated.
  - Q. What size are these handles?
- A. The handles, that is over all, lugs and everything, inside of the handle is about 6 inches; about 9 inches over all, approximately 9 inches and 6 inches in the center of the grasp.
  - Q. How thick is the metal of the grasp?
  - A. About an inch and a quarter.
- Mr. CATHCART.—The same objection to all this line of testimony.
- A. —about an inch and a quarter wide by  $\frac{3}{8}$  of an inch thick, as near as I can give you offhand.
- Mr. CAREY.—Q. How firmly are these handles attached? A. Right tight, tight up.
  - Q. With reference to the date, you said something

(Testimony of W. J. Tomlin.)

about this being before the "Great Northern" steamship went on the Honolulu run?

A. One of the runs; I would not say for sure it was the first run, but I know they were put on before they were put on the "Northern Pacific," because they were done when the boat was running to Honolulu; the other was put in afterwards.

- Q. Under whose direction did you put those on?
- A. Mr. Switzer, our outside foreman.
- Q. The outside foreman of your firm?
- A. Yes. [501]

### Recross-examination.

Mr. CATHCART.—Q. Did I understand you to say they were put on the "Great Northern" on the first run to Honolulu?

A. No; I say they were put on the "Great Northern" first, before they were put on the "Northern Pacific."

Q. How do you know that?

A. Because I know I put them on before she went to Honolulu, and put on the others probably a month after.

Q. That is, you put them on the "Great Northern" before she went down to Honolulu?

A. Yes, on one trip; I would not say the first or second trip, I don't know the dates of the sailing, but I know they were not on the first trip, I am pretty sure they were not on the first trip she went out.

- Q. Do you know when her first trip was?
- A. No.
- Q. Do you know when her second trip was?

(Testimony of W. J. Tomlin.)

- A. No.
- Q. Do you know when her third trip was?
- A. No, not in regard to the date.
- Q. So that you really don't know what trips she did make before you put on the handles?
- A. Ho. I should judge one trip; I think about that, but I couldn't say for sure.
  - Q. Why do you judge so?
- A. Well, because I put them on when she came back from Honolulu on one trip; she must have made one trip previous to that.
  - Q. Did not make two trips previous to that?
- A. I would not say for sure, because I have no basis for that.
- Q. You did not keep track of the trips of the "Great Northern" to Honolulu, did you? A. No.
- Q. Now, you don't know that that handle that you say is located there in the photographs is the handle in the "Northern Pacific" steamship's bath, do you?
- A. I don't know whether this is in the "Great Northern" or "Northern Pacific" as they [502] appear here; you can't tell.
  - Q. You don't know?
- A. No; both baths are identical, the same in that regard; the handles are in the same position and the shower-baths look alike, similar in both baths.
- Q. You worked five hours putting on handles, drilling the holes and everything?
  - A. Whatever the time is here,  $5\frac{1}{2}$  hours.

### (Testimony of W. J. Tomlin.)

- Q.  $5\frac{1}{2}$  hours altogether? A. Yes.
- Q. Drilling holes and putting the handles on?
- A. Yes. [503]

### Testimony of J. B. Switzer, for Claimant.

J. B. SWITZER, called for the claimant, sworn.

Mr. CAREY.—Q. Where do you reside?

A. 823 Alvarado Street, San Francisco.

Q. What is your business?

- A. Shipfifter; foreman at the present time for Muir & Symon.
  - Q. What is the business of Muir & Symon?
  - A. Ship repairing and overhauling and so forth.
- Q. Were you outside foreman of that firm in January, 1916? A. Yes.
- Q. Do you remember anything about installing in the shower-baths of the "Great Northern" the grabhandles that are fastened to the slabs at the back wall of these baths?
- A. Yes; I received a requisition from Mr. Muir; he made duplicates of it and handed me one of the duplicates, and I went down to the boat and saw what was wanted, and ordered the handles made at the foundry, and instructed Mr. Tomlin to drill the holes and have everything ready, so when the handles came they were ready to be put on, at the place.
- Q. Can you give us the date when they were installed on that ship?
- A. I could not exactly give you the date any more than January, outside of what these time-cards show.
  - Q. You are sure it was in January, 1916?

- A. Yes.
- Q. Why are you sure of that?
- A. Well, on account of the dates of the time-cards and the dates of the requisitions.
- Q. Will you describe these handles. You had them made, I think you said, at the brass foundry?
- A. I had them made at the brass foundry from a pattern, about 9 inches long and about  $1\frac{1}{2}$  inches away from the wall, about 6 inches of grab. [504]
  - Q. How wide was the metal at the grab?
- A. The thickness of the metal is about  $\frac{3}{8}$  of an inch; it is not exactly flat, it is oval-shaped, so that it could be easily grabbed by the hand.
  - Q. About 3/8 of an inch thick and about how wide?
  - A. About an inch and a quarter.
  - Q. How are they fastened to the wall?
- A. A hole was bored through the marble slabs, and it was screwed into the T. & G. back of the slab.
- Q. Are you able to say positively that these handles were so installed prior to February 18, 1916?
  - A. Yes.
- Q. Are you the Mr. Switzer that was referred to by Mr. Tomlin the witness who just left the witness-stand? A. Yes.
  - Q. Did you superintend his work? A. Yes.
- Q. What are the nature of your duties with Muir & Symon?
- A. When I receive the application, it is my duty to see that the work is ready to put up and to get the work under way; also it is my duty to go over the

work after it is finished and see that it is done properly.

### Cross-examination.

Mr. CATHCART.—Q. You were foreman, were you, all this year for Muir & Symon? A. Yes.

Q. Has your attention been called to these handles lately? A. No.

Q. When did you first hear anything about these handles—after being put on?

A. After they were put on?

Q. Yes. A. About three months ago.

Q. You talked it over with somebody? A. Yes.

Q. Whom?

A. This gentleman here (pointing to Mr. Relf). [505]

Q. Have you any independent recollection of the matter at all as to the time? A. No.

Q. You go merely by these time-cards?

A. By the time-cards.

Q. And rely on that for the date? A. Yes.

Q. As to whatever you have said with reference to the time when it was put on? A. Yes.

Q. You have not that requisition that you speak of?

A. The requisition must be in the office—no, I think the requisition was turned back with the bill.

Q. You have not seen the requisition at all?

A. I did not see the requisition; I only have a duplicate of the requisition.

Q. You have not seen that duplicate since you did the work? A. No, I have not.

- Q. So you do not fix any date by the duplicate at all? A. No, there is no date on the duplicate.
- Q. When you say that the work was done in January you say it because of the time-card here?
  - A. The time-card.
- Q. You had a requisition for the same work on the "Northern Pacific," did you not? A. Yes.
  - Q. Did the same work on that?
  - A. Did the same work on that.
  - Q. Put in handles?
  - A. On the "Northern Pacific," yes.
- Q. You ordered the handles from the brass foundry? A. Yes.
  - Q. What brass foundry?
  - A. W. T. Garratt.
- Q. Have you any recollection of the time that you ordered those handles made? A. No.
- Q. Have you any recollection as to the time it took for them to make the handles?
- A. About a day to make them, or two days; I guess it must have been three days before I got them back, from [506] the time I ordered them, between getting them made and nickle-plated.
- Q. Have you any independent recollection as to the time, or are you just speaking from your knowledge of the time that it usually takes?
  - A. My knowledge of the time it usually takes.
  - Q. You have no independent recollection?
  - A. No.
- Q. Where was the "Great Northern" lying when these handles were put on?

  A. I believe Pier 25.

- Q. Have you any independent recollection of its lying there when you put the handles on or are you just speaking from the fact that it generally lies at Pier 25?
- A. No, it did not generally lie at 25; at that time it was lying at Pier 25.
  - Q. So you do remember it was lying there?
  - A. Yes.
  - Q. Where was the "Northern Pacific" lying?
  - A. Pier 11 or 9; I could not say which.

(An adjournment was here taken until Monday, August 7, 1916, at 10 A. M.)

August 7th, 1916.

(An adjournment was here taken until 2 P. M. of the same day.) [507]

Monday, August 7, 1916.

### Testimony of Katie Schnieder, for Claimant.

KATIE SCHNIEDER, called for the claimant, sworn.

Mr. CAREY.—Q. What is your place of residence?

- A. 1183 Broadway, Alameda.
- Q. What is your business? A. Bookkeeper.
- Q. For what firm?
- A. Muir & Symon, Incorporated.
- Q. Were you bookkeeper for that firm during January, 1916? A. Yes.
- Q. Did you make some entries in regard to repairs on the "Great Northern" about that time?
  - A. Yes.

- Q. Can you state from reference to the original entries made by you the date when the handles were put on the shower-baths on the "Great Northern"?
  - A. Yes.
  - Q. What date was it?
  - A. January 24 and January 25.
  - Q. 1916? A. Yes.
- Q. Look at the sheets I hand you and state in whose handwriting they are?
  - A. In my handwriting, all of it.
  - Q. What are those three sheets?
- A. They are the work on the steamer "Great Northern."
- Q. Does it show there the date when the work was done? A. Yes.
  - Q. What else does it show?
- A. All the other repairs according to the requisitions.
  - Q. From what source did you get that?
  - A. From the time-cards handed in.
- Q. I call your attention to Claimant's Exhibits 5 and 6 being the time-cards, and will ask you whether those are the time-cards referred to in your last answer?

  A. Yes, sir.
- Q. Please indicate on those sheets which have just been shown [508] you where the entries are made thereon relating to the drilling of the marble and setting of the handles in the shower-baths on the "Great Northern"?
  - A. On that and on the 25th and this on the 24th.
  - Q. Did your firm give this particular job on the

(Testimony of Katie Schnieder.) steamship a number? A. Yes.

- Q. What number was it? A. 86.
- Q. Do these sheets show the number 86?
- A. Yes.
- Q. Is that the number at the top right-hand corner? A. Yes.
- Q. Now, will you please put a check-mark at the side of these items on January 24 and January 25, that relate to these handles?

  A. Yes.
- Q. Now, for what purposes were these sheets made up in your business?
  - A. In order to make up the bills from.
- Q. State what the practice is in your firm of keeping the accounts.
- A. First we have the requisition from the company and we enter it in the order-book and give it an order number; then the order number is given to the foreman; also three copies of the requisition are taken and one is given to the foreman and one for our use, and the other kept on a special file for reference; the foreman gives the number to the men on the job and they put the number on the time-card and we check from that.
- Q. So that your accounts, if I understand you, are made up on sheets in your writing such as are in evidence here, from the time-cards? A. Yes.
- Q. Then you had other time-cards besides these exhibits 5 and 6, to make up this particular account, did you? [509] A. Yes, sir.
- Q. On exhibit 5, being a time-card, there appears opposite the item 86 the letters "G N SS" and

"N P SS." In whose handwriting are those?

- A. W. J. Tomlin.
- Q. In posting these items to what job did you charge them? A. Job 86.
  - Q. On which steamship?
  - A. 'On the steamship "Great Northern."
- Q. Will you state why the second item marked "N P SS" was not charged to "Northern Pacific" steamship?
- A. Because the work was done on the "Great Northern"; that is a mistake.
  - Q. It should be— A. "G. N."
  - Q. It should be "G. N." instead of "N. P."?
  - A. Yes.
  - Q. How do you know that?
- A. Because at that time that was the only time we were doing such a job, and it could not be charged to any other number.
  - Q. That was No. 86? A. Yes.
  - Q. Which was the "Great Northern" job?
  - A. Yes.
- Q. In your previous answer you referred to a requisition that is supposed to be made up when you get the order to do the work? A. Yes.
- Q. I show you a typewritten sheet marked at the top "No. 86, 'Great Northern' Steamship"? Is that the requisition for this job? A. Yes.
- Q. Among other items appears the item "Grabbars in all shower-baths": will you state whether or not that item relates to the matter in this account regarding these handles? A. Yes, it does. [510]

Mr. CAREY.—I will offer in evidence the three sheets identified by the witness and testified by her to be in her handwriting.

(The sheets are marked Claimant's Exhibits 7.)

I also offer in evidence the typewritten requisition identified by the witness.

(The typewritten requisition is marked Claimant's Exhibit 8.)

### Cross-examination.

Mr. SMITH.—Q. Do you know when you made this copy of Claimant's Exhibit 8?

- A. Yes, January 20, 1916.
- Q. How do you know that you made it on the 20th?
- A. That is the date it was issued.
- Q. There is nothing on it to indicate that, is there?
- A. No, but that is the time the job was done.
- Q. You are testifying now from memory or from your books?

  A. Partly from memory.
- Q. Did you look it up just before coming here, look at your books to get the date?
- A. Well, not for that purpose; we looked it up the other day when I got the records out.
  - Q. What did you say the date was?
  - A. January 20, 1916.
- Q. That was the date the requisition came into your hands? A. Yes.
  - Q. What was done with the original requisition?
  - A. It is turned back to the office with the bill.
- Q. When did you make this Claimant's Exhibit No. 7—when did you write in these items?
  - A. Generally the day after the time-card is turned

in; the day after the job is done; they are posted the day after.

- Q. Is this what you call posting?
- A. Yes, from the time-cards.
- Q. So that this exhibit No. 7 you would say was written by you when?
- A. The day after the time-cards were turned in. [511]
- Q. Then this item concerning drilling marble in shower-baths using one electric drill four hours, and dated January 24, 1916, you would say that that item was placed by you on this Claimant's Exhibit No. 7 on January 25, approximately? A. Yes.
- Q. You have not made any entries on this paper since that time? A. No.
- Q. Do you have any personal recollection aside from your books and from these notes of the doing of that work on the "Great Northern" in January of this year?

  A. Yes.
- Q. Aside from your books and your records you are confident that it was done at that time?
  - A. Yes.
- Q. You are familiar with the handwriting of Mr. Tomlin, are you? A. Yes.
- Q. Are you certain that those items on Claimant's Exhibit No. 5, "G N SS" are in his handwriting?
  - A. Yes.
  - Q. Also "N P SS"? A. Yes.
- Q. If he testified that those were not his handwriting, do you think that he was mistaken?
  - A. Yes, absolutely.

Q. Do you remember when the bill for these matters was sent to the Northern Pacific Steamship Company? A. The exact date?

Q. Yes, for the work done on order No. 86.

A. I think about two or three weeks later; the exact date I could not say.

Q. You do not know personally, I suppose, as to the fact that the steamship was in port at that time, do you—that is, you did not see it? A. No. [512]

### Testimony of Sam B. Stoy, for Claimant.

SAM B. STOY, called for the claimant, sworn.

Mr. CAREY.—Q. Mr. Stoy, where do you reside and what is your business?

A. 2305 Scott Street, San Francisco. Manager of the London & Lancashire Fire Insurance Company, London & Lancashire Indemnity Company.

Q. Will you state whether or not you were a passenger on the "Great Northern" steamship on its trip from San Francisco to the Hawaiian Islands and return in February, 1916? A. I was.

Q. Do you recollect what room you occupied or what deck you were on? A. The C deck.

Q. Will you state whether or not you had occasion to use the shower-baths on that trip?

A. I did; I used them every day, sometimes twice a day.

Q. Please state whether or not you experienced any difficulty or found any danger in using it.

Mr. SMITH.—Objected to upon the ground that it calls for the conclusion of the witness.

(Testimony of Sam B. Stoy.)

A. Why I had no difficulty with the equipment; my memory is there was a sort of bowl to stand in, of porcelain, at the bottom, and when I took my shower, in case the ship lurched any I took hold of the pole on which the curtain was suspended or handle; that is, the faucet, as you call it, or a handle, as I remember it, that was in the back of the bath compartment.

Mr. CAREY.—Q. Do you know the libellant, Mr. Hutchins?

A. Yes, I know him.

Q. Do you remember the day when he was supposed to be hurt in using the shower-bath on the ship; was the circumstance called to your attention at that time? A. Yes.

Q. In what way was it called to your attention? [513]

A. Through his telling me that he had fallen while taking his shower-bath that morning and wrenched his shoulder or arm.

Q. Do you remember the weather conditions at that time? A. Yes.

Q. What was the condition?

A. So far as the ocean travel is concerned, the sea was fairly calm; that is, it felt so to my belief; I was fairly comfortable.

Q. Do you know whether you took a shower-bath that day? A. I did.

Q. Do you recall any difficulty experienced by you in so doing? A. No.

### (Testimony of Sam B. Stoy.)

Cross-examination.

Mr. SMITH.—Q. What did Mr. Hutchins say to you?

A. He said he had fallen down with a lurch of the ship or slipped down, and did not consider the porcelain bottom good protection.

Q. What else did he say, if you remember?

A. I don't recall any material statement except when I saw him later in Honolulu he said that on medical examination he found he had his arm broken instead of being wrenched.

Q. Have you seen a photograph of the bath-rooms recently? A. Yes.

Q. Who showed you that photograph and where?

A. The claims agent of the steamship company one day last week, I do not just recall what day it was.

Q. That photograph showed you the handle affixed to the wall in the back part of the shower?

A. Yes, it was there and also the handle.

Q. Also which handle?

A. The handle with which we turned the water on.

Q. The faucet handle? A. The faucet handle.

Q. What did the agent say in regard to the handhold at the [514] back of the shower?

A. Nothing.

Q. Did you have any discussion with him or was anything said as between you concerning that handhold on the back of the shower?

A. I think I mentioned that or asked the question if that was there at the time I was on the ship, merely because my memory was not clear as to that, because

my habit was when the ship lurched a little, to reach up, as I am very tall, and grab the curtain pole right in front as I naturally would do. [515]

### Testimony of Samuel Symon, for Claimant.

SAMUEL SYMON, called for the claimant, sworn.

Mr. CAREY.—Q. Where do you reside?

A. 785 Kingston Avenue, Oakland.

Q. What is your business?

A. Vice-president and general manager of the firm of Muir & Symon.

Q. Did your firm do some work in drilling marble in shower-baths and placing handles in the back of the shower-baths on the steamship "Great Northern"? A. Yes.

Q. When did they do that?

A. It was done from the 20th to the 25th of January of this year.

Q. 1916? A. Yes.

Q. How do you know the date?

A. Well, in checking up the date, we have got our requisitions, and when the job was finished—we started the job on the 20th and we finished on the 25th.

Q. Did your firm make those handles or did you purchase them?

A. We purchased them; in fact, I attended to the matter myself, went out and had the pattern-maker at Garratt's make a pattern and got the things cast there at the brass foundry, Garratt's brass foundry.

Q. Is that W. T. Garratt & Co., of San Francisco, California?

A. Yes, up on Fremont Street, W. T. Garratt & Company.

Q. Did that firm bill on Muir & Symon for that or on the steamship?

A. Muir & Symon.

Q. Please examine the bill which I hand you and see whether that is the bill for the handles?

A. Yes, 10 nickle-plated pulls.

Q. What date?

A. It is billed here on the 25th; we got them on the 23d or 24th, probably on the 24th or 25th, a day or two ahead sometime.

Q. In January, 1916? A. Yes. [516]

Mr. CAREY.—I offer in evidence the bill of W. T. Garratt & Company referred to by the witness.

(The bill is marked Claimant's Exhibit 9.)

Q. Now, Mr. Symon, did your firm furnish the screws or bolts that were necessary in fastening these handles or did you purchase them?

A. We purchased them.

Q. From whom did you purchase them?

A. From Marwedel on First Street near Mission.

Q. Who attended to that,—did you or someone else? A. I attended to it.

Q. Did that firm bill on Muir & Symon or on the steamship for those items? A. Muir & Symon.

Q. I will show you two bills of C. W. Marwedel, San Francisco, California, to Muir & Symon, dated respectively January 4, 1916, and January 25, 1916, and I ask you whether those are the bills you refer to?

A. Yes. These first screws we got 50 of were 3 inches long, were for the job No. 86, as I marked it there when the bill came in; ordinarily we send a written order out for this stuff when we buy it, but these bolts are in and out so quick, when I attend to it myself I generally do not get the order number; that is why there was no order number on the bill; so when the bill came in it was referred to me and I put the order number on, 86.

- Q. What does that 86 refer to?
- A. That is the number of the job.
- Q. That is Muir & Symon's number?
- A. Muir & Symon's number; when the job comes in that job has got a number and the work for the job is charged up to No. 86.
- Q. Now, this job on the "Great Northern" steamship, did it include other items besides the handles?

  [517] A. It included a number.
  - Q. All were included, as I understand you?
  - A. In the one bill.
  - Q. No. 86?
- A. Yes. I recall the instance so well, as the foreman on the job, Switzer, came up and told me that two of the handles, the marble was further away from the wood, and he did not have long enough screw fastenings, that he only had screws that would go in half an inch and asked me if he should let it go, and I said no; I immediately turned around and went up town and got 16 more screws ½ inch longer to make them more secure.
  - Q. Are those the 3½ inch screws that are in the

second of these Marwedel bills? A. Yes.

Mr. CAREY.—I offer in evidence the two bills identified by the witness.

(The bills are marked Claimant's Exhibit 10.)

- Q. What is the practice in your firm in putting through a job as to making out requisitions and keeping track of the work and finally making a charge and rendering bills? Describe the process.
- A. Well, the general rule is, if there is a job down there either Muir or myself go down and see the superintendent, and very often get a list from the chief steward or get a list from the mate or the chief engineer and go ahead with it; after we get the list we have these copies made of it.
  - Q. What do you call these copies?
  - A. That is a copy of the requisition.
- Q. Is that the requisition which was referred to by Miss Snieder? A. The same requisition, yes.
- Q. The same as Claimant's Exhibit No. 8 in this case? A. Yes, and we go down then— [518]
- Q. —Wait a minute. State when it is that your firm gives a number to the job.
  - A. When we get the job.
- Q. This number 86 at the top of this requisition, Claimant's Exhibit No. 8, was that the number of this particular job?
  - A. The number of this particular job, yes.
  - Q. For the "Great Northern" steamship?
- A. For the steamer "Great Northern," yes. The job was given to us on January 20th and finished on January 25, 1916.

- Q. Referring now to Garratt's bill, being "Claimant's Exhibit No. 9," there are some other items on the bill besides these handles, are there not?
  - A. Yes, nickle-plated pulls.
- Q. The handles are described as nickle-plated pulls?
- A. Yes, I might say, on account of there being three numbers there that Mr. Muir put on "Great Northern" "86" and then he referred it to me as "S C S" to put the number of these items on.
- Q. Did your firm make out a bill against the "Great Northern" and owners for this job?
  - A. We did.
  - Q. No. 86? A. Yes.
- Q. I call your attention to a typewritten sheet here and ask you whether or not that is the bill?
  - A. That is the bill.
  - Q. What date?
- A. It is dated January 25, the date the job was finished.
- Q. Now, have you any personal recollection about the date of this fastening of the handles on the ship in relation to the ship making a voyage to the Hawaiian Islands?
  - A. I think it was done the second trip.
- Q. I mean was it done before the ship went to the island? A. Yes.
- Q. It was done, finished by, you say, by January 26?
- A. Finished up January 25, the last day we worked on it was January 25. [519]

### American Steamship "Great Northern" et al. 541

### (Testimony of Samuel Symon.)

- Q. Did your firm do any work of this character for the steamer "Northern Pacific" at any time?
  - A. We did.
  - Q. When?
  - A. A week after—about a week after.
  - Q. February 3d and 4th, 1916?
  - A. Yes, that is the "Northern Pacific."
  - Q. What number was that job? A. No. 140.

### Cross-examination.

Mr. SMITH.—Q. Where is the item, Mr. Symon, on your bill of January 25, 1916, to the "Great Northern" for grab-handles?

- A. There, grab bars in all shower-baths.
- Q. Do you know personally that these grab-handles were put on the boat? A. I do.
  - Q. You saw them? A. I saw them put on.
  - Q. At that time?
  - A. At that time, that particular trip, yes.
- Q. Now, you testified that you put grab-handles in the shower-baths of the "Northern Pacific" a week later?

  A. About a week later.
  - Q. What was the date? A. February 3d and 4.
- Q. You put similar grab-handles in all of the "Northern Pacific" showers at that time, did you?
  - A. Yes.
- Q. Precisely the same kind of handle, in the same place? A. Yes, practically the same place.
  - Q. You saw them personally? A. Yes.
- Q. So that you know by this date the grab-handles were in the shower-baths on both steamships?
  - A. Of both steamers, yes.

- Q. What metal were these grab-handles made of?
- A. They were made of bronze, brass and nickle-plated.
  - Q. What kind of screws did you use on them?
- A. Roundhead screws, screwed right into the wood back of them. [520]
  - Q. Nickle-plated screws or brass screws?
  - A. Brass.
  - Q. Without nickle-plated heads then?
- A. I would not say; I am pretty sure some were nickle-plated but the last ones I know were not, the long ones.
  - Q. They were just put in as brass screws?
- A. As brass. We did not have time to get them nickle-plated. You just get the brass screw and take it down and have it nickle-plated.
  - Q. You did not do that? A. No.
  - Q. You just put it in without having it nickeled?
  - A. Yes.

(It is stipulated and agreed between counsel that the reading over of the testimony to the witnesses and the signing thereof is waived.) [521]

American Steamship "Great Northern" et al. 543
Claimant's Exhibit No. 1.



### Claimant's Exhibit No. 2.



American Steamship "Great Northern" et al. 545 Claimant's Exhibit No. 3.



# Claimant's Exhibit No. 4—Mate's Log of Steamship "Great Northern," Voyage No. 39.

Mate's Log of Steamship Great Northern, Voy. #39 West From San Francisco to Honolulu via San Pedro and Hilo, and return. Date February 1916 18 Pilot House Compass S 43° W Standard Compass S 49° W Actual Distance 47.9 Distance by Log 747.9 Remarks Friday, February 18 1916 Retarded clocks 32 mins.

Time by Clock 4 Pilot House Compass S 43° W Standard Compass S 49° W Time on Course Hours 4 Min. 32 Actual Distance 38.4 Distance by Log 786.3 Revolutions by Wheel 284 Wind S. W. 2 Weather B Barometer 30 21 Thermometer 65 Remarks Fine and clear light breeze smooth sea heavy N W swell

Actual Distance 37.6 Distance by Log 825 Remarks Tanks and bilges sounded bilges dry

Time by Clock 8 Pilot House Compass S 43° W Standard Compass S 49°W Time on Course Hours 4 Min. 00 Actual Distance 38.6 Distance by Log 862.6 Revolutions by Wheel 283.7 Wind South. 4 Weather B. q. Barometer 30 27 Thermometer 73 Fresh Breeze passing squalls small sea heavy Nly swell.

Actual Distance 28.6 Distance by Log 901.2 Time by Clock 12 c/c Pilot House Compass S 42° W. Standard Compass S 48 W. Time on Course Hours 4 Min. 00 Actual Distance 38.1 Distance by Log 939.3 Revolutions by Wheel 286.4 Wind S. W.

4. Weather B. C. Barometer 30 29 Thermometer 76 Remarks Fine weather mod breeze small sea mod swell

Latitude 26° 30′ N Longitude 141° 19′ W Course S 65° 06′ W. Distance 461 Miles Runn Time 24 hours 32 mins. Av. Speed 18.79 Pilot House Compass S 42° W Standard Compass S 48° W Actual Distance 38.7 Distance by Log 978 Remarks Fine weather partly cloudy mod N. W. swell [525]

Time by Clock 4 Pilot House Compass S. 41° W Standard Compass S 48° W Time on Course Hours 4 Min. 00 Actual Distance 38.5 Distance by Log 1016.5 Revolutions by Wheel 286 Wind N. N. W. 3 Weather B. C. Barometer 30 27 Thermometer 70 Remarks Tanks and bilges sounded bilges dry.

Actual Distance 38.2 Distance by Log 1054.7.

Time by Clock 8 Pilot House Compass S 41° W Standard Compass S 48° W Time on Course Hours 4 Min. 00 Actual Distance 37.6 Distance by Log 1092.3 Revolutions by Wheel 285.8 Wind North 4 Weather B Barometer 30 36 Thermometer 67 Remarks Fine and clear weather fresh breeze heavy Nly swell

Actual Distance 40.2 Distance by Log 1132.5

Time by Clock 12 Pilot House Compass S 41° W Standard Compass S 48° W Time on Course Hours 4 Min. 00 Actual Distance 39.6 Distance by Log 1172.1 Revolutions by Wheel 287.5 Wind N. E. 4 Weather B. C Barometer 30.41 Thermometer 68 Remarks Fine weather mod breeze small sea heavy swell. [526]

# Claimant's Exhibit No. 5—Time-card of W. J. Tomlin, Dated January 24, 1916.

MUIR & SYMON.

TIME CARD.

Name W. J. Tomlin. Date Jan. 24/16.					
Job Number					
79	1	$\vee$	Bakers oven Northern Pacific.		
<b>7</b> 9	1	$\sqrt{}$	Electric Toasters.		
86	$1\frac{1}{2}$	$\vee$	Removing Ice Box Door Putting in		
			new Ice Cream Box & Replacing		
			Door G. N. S. S.		
86	$41/_{2}$	$\vee$	Drilling Marble in Shower Baths		
			Using Electric Drill 4 Hours.		
	8		N. P. S. S.		

[527]

# Claimant's Exhibit No. 6—Time-card of W. J. Tomlin, Dated January 25, 1916.

### MUIR & SYMON.

TIME CARD.

Name	W. J. 7	Coml	in. Date Jan. 25/16.
	Hours Wor		
Number	Floor Ma	chine	Articles Worked on Material
#84	$51/_{2}$	$\sqrt{}$	Steering Gear Great Northern.
#86	1	$\vee$	Washers in Ice Box Doors
			Butcher shop.
#86	1	V	Handles in Shower Baths.
#85	$1/_{2}$	V	Fastening Life Preservers.
	8		

[528]

### Claimant's Exhibit No. 7—Voucher.

GREAT NORTHERN.

Dat	e.			-					
					Time				Amount
1916	ŝ	Stewards Dept. B.S. M	[, ]	M.M.	F.	H.	Boy	11400	
Jan	. 22	Bro't. forw'd.							93.70
66	22	F. McCormack (Tools, Lumber,							
		pots, Tiles & 2 Bars)				$6\frac{1}{2}$			3.25
66	24	W. Tamlin				13			.75
		Removing Ice Box Door, put-							
		ting in new Ice Cream Box	ĸ						
		& Replacing Door							
44	24	W. Tamlin				41/2			2.25
		Drilling Marble in Shower							
		Baths, Using Elec. Drill							
		4 hrs.		4					4.24
44	24	F. Switzer (Bake Oven,							
		complete, as ordered)			1				.81
66	24	F. Switzer (Ice Chest in							
		Butchershop)			1				.81
86	24	F. Switzer (8 Brackets for							
		Joiner)			11/2				1.22
		8 Brackets 2#						$04\frac{1}{2}$	.09
**	24	F. Switzer (Tables for Palm							
		Garden)			1.				.81
66	24	F. Switzer (Deck Chairs)			1				.81
46	24	F. Switzer (Guard for Range)			1				.81
66	24	F. McCormack (Chairs, Wick-							
		ing, Cupholder, 2 Bars							
		Iron)				7			3.50
**	24	C. West							1 —
		Lengthening 2 Bars 1#						$04\frac{1}{2}$	.05
44	24	H. D. Pruitt (Chairs)				7			3.50
41	25	L. Wing			4				3.25
	26	Jas. Graham Mfg. Co.  3 Wire Handle Stove Knobs							0.5
		Wife Handle Stove Khops						30	.35
									121.20

#### GREAT NORTHERN.

Date.		Time	
			Rate Amount
1916	Stewards Dept. B.S. M.	M.M. F. H. Boy	
Jan. 26	Bro't. forw'd.		121.20
" 22	O. Avelin (Drilling holes,		
	Oven)	1	.50
" 22	O. Avelin (Drilling holes,		
	Bench)	11	.75
" 21	J. Switzer	4	3.25
" 21	T. Malti (Drilling holes		
	for plumber)	8	4 —
" 22	W. Lindblom (plate in Bake		
	Oven)	21	1.25
" 22	W. Lindblom (Door Steam		
	prover)	4	2 —
" 22	W. Lindblom (Angle on Table)	2	1 —
" 22	J. Switzer	8	6.50
" 22	O. Avelin (Bakers Drum)	21	1.25
" 22	H. Bever (Making Brass pins		
	for Settees)	1	.50
" 22	T. Malti (Tile in Galley)	2	1
" 24	O. Avelin (plate Bake Oven)	11	.75
" 24	O. Avelin (Chairs)	5 <del>1</del>	2.75
" 24	H. Bever (Making Brass		
	pins for Settees)	31	1.87
" 24	H. Bever (Grate Irons for		
	Ranges)	23	1.37
" 24	J. Switzer	8	6.50
" 24	O. Carlson (pipe fitting)	4	3.25
" 25	W. Tamlin (Washers in Ice		
	Box, Doors, Butchershop)	1	.50
" 25	W. Tamlin (Handles in		
	Shower Baths)	1	.50
			160.69

### American Steamship "Great Northern" et al. 551

#### GREAT NORTHERN.

Date.		Time	
			Rate Amount
1916	Stewards Dept. B.S. M.	м.м. ғ. н. в	Воу
Jan. 25	Bro't. forw'd.		160.69
" 24	W. Lindblom (plate Bakers		
	Oven)	4	2 —
" 24	W. Lindblom (Ice Box		
	Butchershop)	1	.50
" 24	W. Lindblom (Handles Shower		
	Baths)	3	1.50
" 25	F. Switzer (Hole for plumber		
	in Bake Shop)	1	.81
" 28	F. Switzer (Curtain Rods)	2	1.62
" 25	W. Lindblom (Ice box Doors)	1	.50
" 25	W. Lindblom (Handles Shower		
	Baths)	3	.25
" 2!	5 F. McCormack (Angle, Cup-		
	holder, Chairs)	5	2.50
" 2	O. Carlson (pipe fitting		
	for New sink)	3	2.44
" 2	2 H. N. Cook Belt Co., #1881		
	1 pc. Belt Leather 7"		
	wide x 3 ft. long		2.52 3.03
" 2	4 F. Zunio #1892,		Attornoon-MARKO
	Rep'g. 2 Chairs		3 3.60
" 2	Henry Cowell Lime Co. #1886		
	1 Sk. Clay		87 1.05
" 2			
	50-1/4 x 3/4 Stove Bolts		15 .18
	25—1/ x 1 " "		10 .15
" 2	2 W. W. Montague #1883		
	6 pcs. 6 x 6 Red Quarries (3 use	ed)	60 .72
			181.54
T529	1		202102

Claimant's Exhibit No. 8—List of Repairs and Improvements in Steward's Department of Steamship "Great Northern."

#86.

S/S. "GREAT NORTHERN."

Req. S. 27.

Stewards Dep't.

1st Cabin Kitchen Repairs.

√Range Guard to be Cut in two pieces.

√Guard around top of Broilers.

√Water Pipe & Faucet in Bakers Shop.

√Proof Box Overhauling.

√Bake Shop Drum Overhauling & Flues Cleaning.

√Ice Cream Scoop Repair.

 $\sqrt{\text{Ice Cream Container retinning.}}$ 

 $\sqrt{3}$ —Sauce Pans, retinning.

 $\sqrt{1}$ —Movable Table for Bake Shop.

Hinges on Doors of Bakers Chill Box overhauling.

√Hinge on Door of Butchers Shop overhauling.

√Hinges on Doors of 1st Cabin Pantry overhauling.

√Scupper Drain in Refrigerator & Butchers Shop Repairing.

√3—Tiles Kitchen Floor fastening & Renewing.

Strap up Bench in 1st Cabin Pantry repairing.

Strap up Table in 2nd Cabin Pantry "

√Fix Handle of Faucet on Milk container 1st Cabin Pantry.

√Knob on 1st Cabin Pantry Steam Table.

 $\sqrt{\text{Need new}}$ , 6—Guards for Range.

√5—Guards for Center Table in Main Kitchen.

One Table for 1st Cabin Pantry.

American Steamship "Great Northern" et al. 553

One Foot Board in front of Strap up Sink Main Kitchen.

√24—Deck Chairs to Repair.

1-Weather Strip on Pantry Table on Starb. Side.

√1—Dining Room Chair to Repair.

√1—Chair from Suites to Repair.

√1—Veranda Chair " '

 $\sqrt{2}$ —Cane Bottom Chairs Smoking Room.

√Overhead Leak in Room 168 (VERY BAD).

Backs of all Settees fall down.

Hooks on all Bathroom Doors in Suites.

√Hot & Cold Water Connections in Showers, Bad Order.

Spring Supports.

Spring Claws.

√Asbestos Washers for Chandeliers for D. R.

√Asbestos Rings & Stops on Suites & Sofa Lights.

√Thin Wire Mesh Netting around Globes head of Beds in suites. Req. #S.

√Thin Wire Mesh around Clusters in Dining Room. Req. #S.

√Grab Bars in all Shower Baths. Req. #S.

√Packing replace on Silveh Machine & Overhaul. Req. #S. [530]

## Claimant's Exhibit No. 9—Receipted Bill of W. T. Garratt Co., Dated January 25, 1916.

All claims must be made ten days from date of invoice, and if goods have proven defective by fault of manufacturer, such material will be replaced but no claims allowed for labor and damages.

W. T. GARRATT & CO.

277 to 299 Fremont Street.

San Francisco, Cal., Jan. 25, 1916.

Sold to Muir & Symon,

Our Register No. ----.

Your Order No. ----

Terms 2% 10 Days Net 60 Days.

Payable in S. F. Exchange.

Interest Charged on Overdue Accounts.

Sent by

12 hat & coat hooks, nickel plated

 $@ 35\phi$  each

4 20-86

10 Nickel plated pulls

5 92—86

12 " hooks & Eyes

12 06-108

22 18

86

86

108

MUIR & SYMON.

Order No. Gre. N. 86.

Charge Account Northern.

Bill Correct.

S. C. S. [531]

### Claimant's Exhibit No. 10-Receipted Bills of C. W. Marwedel, Dated January 24-25, 1916.

Established 1872.

Trade Mark of the Cutter it Means Quick Service

Private Exchange Douglas 4180.

C. W. MARWEDEL.

Accuracy

76-80 First Street

San Francisco, California.

### MACHINISTS' AND ENGINEERS' SUPPLIES. FINE TOOLS.

For all Classes of Metal Work.

Lathes, Drill Presses, Shapers, Milling Machines, Planers, etc.

Copper, Brass and Steel.

Garage Supplies.

Date 1/24/16 #4

Cable Address "Mar"

Terms 30 Days Net.

Sold to Muir & Symon,

1015 Battery St.

Interest Charged on Overdue Accounts.

50 R. H. Brass screws #12 #3" 1 40 Dz 5 83

50%

2 92

86 861/

[Stamped:]

MUIR & SYMON.

Order No. ——

Charge Account 86

Bill Correct

#### Established 1872.

Trade Mark
of the Cutter
it Means
Quick Service
Accuracy
Satisfaction

Private Exchange Douglas 4180.

C. W. MARWEDEL.

76–80 First Street

San Francisco, California.

MACHINISTS' AND ENGINEERS' SUPPLIES. FINE TOOLS.

For all Classes of Metal Work.

Lathes, Drill Presses, Shapers, Milling Machines, Planers, etc.

Copper, Brass and Steel.

Garage Supplies.
Date 1/25/16 #6

Cable Address "MAR"

Terms 30 Days Net.

Sold to Muir & Symon, 1015 Battery St.

Interest Charged on Overdue Accounts.

16 R. H. Brass wood sers  $#14x3\frac{1}{2}$ 

1 65 Dz

2 20

1/2# Brass washers #6

1 10

1 60

50

86 86

50%

 $86\sqrt{}$ 

[Stamped:]

MUIR & SYMON.

Order No. ----

Charge Account 86

Bill Correct

 $\sqrt{}$ 

#### Certificate of Commissioner.

United States of America, State and Northern District of California,—ss City and County of San Francisco.

I certify that, in pursuance of the commission to take testimony hereunto annexed, on Monday, July 31, 1916, at 10 A. M., to which date an adjournment was taken from July 5th, 1916, at 10 A. M., before me, Ira A. Campbell, designated as Commissioner in the commission to take testimony hereunto annexed, at my office in the Merchants Exchange Building, 465 California Street, in the city and county of San Francisco, State of California, personally appeared Walter A. Scott, A. Ahman, H. K. Relf, John B. Morris, S. W. Jamieson, Charles Wall, George Grundy, W. B. Lowenthal, C. S. Mills, W. J. Tomlin, and J. B. Switzer, witnesses called on behalf of claimant in the cause entitled in the caption hereof, and John W. Cathcart Esq., of the firm of Thompson, Milverton & Cathcart, and Grant H. Smith, Esq., appeared as proctors for the libellant, and Charles H. Carey, Esq., of the firm of Carey & Kerr, appeared as proctor for the claimant; and the said witnesses being by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in said cause, deposed and said as appears by their depositions hereto annexed; that at the conclusion of the taking of said depositions an adjournment was taken until Monday, August 7th, 1916, at 2 P. M., at which time and at the same place personally appeared before me Katie Schnieder, Sam B. Stoy and Samuel Symon, witnesses called on behalf of claimant in the cause entitled in the caption hereof, and Grant H. Smith, Esq., appeared as proctor for the libellant and Charles H. Carey, Esq., of the firm of Carey & Kerr, appeared as proctor for the claimant, [533] and the said witnesses having been by me first duly cautioned and sworn to testify the truth, the whole truth and nothing but the truth, in the cause aforesaid, did thereupon depose and say as appears by their depositions hereto annexed.

I further certify that said depositions were then and there taken down in shorthand notes by Edward W. Lehner, and thereafter reduced to typewriting; and I further certify that by stipulation of the proctors for the respective parties the reading over of the depositions to the witnesses and the signing thereof was expressly waived.

Accompanying said depositions and referred to and specified therein are Claimant's Exhibits 1 to 10, inclusive.

And I do further certify that I have retained the said depositions in my possession for the purpose of mailing the same with my own hand to the clerk of the United States District Court for the District and Territory of Hawaii at Honolulu, Territory of Hawaii, the court for whom the same were taken.

And I do further certify that I am not of counsel nor attorney for either of the parties in the said depositions and caption named, nor in any way interested in the event of the cause named in the said caption.

American Steamship "Great Northern" et al. 559

IN WITNESS WHEREOF, I have hereunto set my hand at my office aforesaid, this 22d day of August, 1916.

(S.) IRA A. CAMPBELL, Commissioner. [534]

Filed Nov. 6, 1916, at —— o'clock and —— minutes —— M. (Sgd.) Geo. R. Clark, Clerk. By ————, Deputy Clerk.

In the District Court of the United States, in and for the Territory and District of Hawaii.

IN ADMIRALTY-LIBEL IN REM.

No. 147.

CLINTON JAMES HUTCHINS,

Libellant,

VS.

The American Steamship "GREAT NORTHERN,"
Her Tackle, Apparel, Furniture, Boats and
Appurtenances, and Against All Persons
Having or Claiming to Have Any Interest
Therein and Against All Persons Lawfully
Intervening in Their Interests Therein,

Libelee,

and

A. AHMAN,

Master and Claimant.

Deposition of Dr. Barney R. Simons, Taken Before William H. Whitaker, Esq., Commissioner, at the Office of Messrs. Biddle, Paul & Jayne, 505 Chestnut Street, Philadelphia, Pennsylvania, on Thursday, September 28th, 1916, at 10 O'clock A. M.

Present: The COMMISSIONER.

Messrs. THOMPSON, MILVERTON & CATHCART, by EDGAR J. PERSH-ING, Esq., Attorneys for Libellant.

Page 1. [535]

Page 2. Messrs. SMITH, WARREN & SUTTON,
By HOWARD H. YOCUM, Esq., of
the Firm of Messrs. BIDDLE, PAUL &
JAYNE, Attorneys for Libellee, and A.
AHMAN, Master and Claimant.

Dr. BARNEY R. SIMONS, Witness.

To the Clerk of the United States District Court for the District and Territory of Hawaii:

The deposition of Barney R. Simons of the city and county of Philadelphia and State of Pennsylvania, witness of lawful age, produced, sworn and examined on oath, on the twenty-eighth day of September, A. D. 1916, at the offices of Messrs. Biddle, Paul & Jayne, Attorneys, 505 Chestnut Street, Philadelphia, Pennsylvania, by me, William H. Whitaker, a Notary Public of the Commonwealth of Pennsylvania residing in the city of Philadelphia, commissioner herein, in pursuance of the commission to take

testimony issued to me, dated the 28th day of July. A. D. 1916, out of the United States District Court in and for the Territory and District of Hawaii. which said commission is hereunto annexed, for the examination of the said Barney R. Simons (described as B. R. Simons in Commission), witness, to be read in evidence on behalf of Libelee and A. Ahman, master and claim-Page 2. Page 3. ant, on the trial of a certain cause now pending and undetermined in the said United States District Court in and for the Territory and District of Hawaii, wherein Clinton James Hutchins is libellant and the American Steamship "Great Northern," libelee, and A. Ahman, master and claimant of said steamship "Great Northern,"

United States of America, Eastern District of Pennsylvania, City and County of Philadelphia,

follows:

The said Barney R. Simons, being first by me duly sworn, [536] according to law, previous to the commencement of his examination, to testify the truth, the whole truth, and nothing but the truth, as well on the part of the libellant as of the said steamship "Great Northern," and A. Ahman, master and claimant thereof, relative to the matters in controversy between the said parties, so far as he should be interrogated thereto, on oath, testified as follows:

# Deposition of Dr. Barney R. Simons, for Libelee. (By Mr. YOCUM.)

Q. Dr. Simons, you are a resident of the Page 3. City of Philadelphia, State of Pennsyl-Page 4. vania? A. I am.

Q. Where do you live?

A. 1102 Walnut Street.

Q. And what is your age?

A. Forty-four.

Q. You are a dentist by profession?

A. Dentist.

Q. How long have you practiced your profession?

A. Twenty-four years.

Q. In connection with your profession have you had any medical training?

A. I was employed in a hospital for several months in Milwaukee, Wisconsin, and I took a preparatory course for medicine but never completed the course of medicine.

Q. You had several years' study in medicine then?

A. I had several years' study in medicine, yes.

Q. And then several years' further study Page 4. dentistry? A. Yes.

Page 5. This in addition to your hospital experience? A. Yes.

Q. You made a trip to Honolulu in the early part of 1916? A. February, 1916. [537]

Q. You took passage from San Francisco for Honolulu?

A. I boarded the steamer at San Pedro, a port near Los Angeles.

- Q. What steamer?
- A. Steamship "Great Northern."
- Q. She was a steamer of the Great Northern Pacific Steamship Company? A. Yes.
- Q. You were accompanied by your wife on that trip? A. I was accompanied by my wife.
- Q. Did you know or did you meet during that trip, Clinton J. Hutchins?
  - A. I didn't meet him. I saw the man aboard the steamer but I didn't know who he was.
- Page 5. Q. There was an accident to Clinton J.
- Page 6. Hutchins durings the passage of the "Great Northern" from California to

#### Honolulu?

- A. There was an accident to a passenger whom I afterwards found to be Clinton J. Hutchins.
- Q. Was Mr. Hutchins also accompanied by his wife? A. Yes.
- Q. Can you recall whether Mr. and Mrs. Hutchins occupied staterooms near yours.
  - A. On the same side of the ship near mine.
  - Q. You saw Mr. Hutchins frequently?
  - A. Frequently.
  - Q. Both before and after the accident.
  - A. Before and after the accident.
- Q. Can you give me a very general description of the man—not as to hair or the color of his eyes, but as to his general physique?
- A. Why, Mr. Hutchins was a man about five feet seven inches tall, weighing about two hundred to two hundred twenty pounds and very heavy from the

waist line up. Enormously thick through Page 6. the [538] shoulders. I would say he is Page 7. rather short-legged. That is about as near as I can describe the man's make-up.

Q. From your knowledge by reason of your training and your experience what would you say as to his balance?

A. Well, I should say the man is balanced as well as a man of that height and weight could be balanced. I shouldn't say that he could take care of himself as quickly as a man one hundred fifty or one hundred seventy pounds. He was a heavy-set man and a man probably between fifty-five and sixty years of age. For the man's build I should say he is pretty well balanced.

Q. What would you say of the balance of a man of his build as compared with the ordinary man of lighter weight and better distributed?

A. Well, he was pretty heavy. I wouldn't say he was well distributed, that is, his weight was well distributed. He is a bit top-heavy and very heavy across the shoulders and through the Page 7. chest.

Page 8. Q. Dr. Simons, Mr. Hutchins' accident occurred in one of the shower-bath rooms on the "Great Northern," did it not?

A. My recollection is that he slipped before he got in the shower, that is, between the two baths.

- Q. But it was in the shower-bath room?
- A. Shower-bath room, yes.
- Q. Are you familiar with the shower-bath room?

A. Yes.

Q. Were you present and saw the accident?

A. I was the only one present and the only one that saw the accident.

Q. Had you been in that shower-bath room prior to the accident and subsequently?

A. I had, yes.

Q. Can you tell us generally how the room is constructed? [539]

(Mr. Pershing suggests to the witness:)

Page 8. Q. Will you draw a plan?

Page 9. Mr. YOCUM.—I have no objection.

The WITNESS.—I have drawn a plan marked with my initials—"B. R. S."

Mr. YOCUM.—Q. Will you just briefly describe your plan telling just what that room is made of?

A. The shower-room was located about amidships—between the port and starboard side—I do not mean amidships between the bow and stern—I mean laterally. There was a door leading from the passageway on the port side into the shower-room and another door from the passageway on the starboard side. The room that contained the showers proper was probably thirty feet square and on the one end of the room—I think the after end of the room—were a row of wash-basins extending right across

the room. On the forward end were two Page 9. shower stalls built—to the best of | | my Page 10. recollection—of marble slabs. To pre-

vent water flowing into the lobby of the shower-room they had provided a porcelain basin to

catch the water from each of these showers. The drop in the center of the basin, I should say is about two inches at a fair estimate. The outer edge of the basins which I have marked with a dotted line is about four inches from the floor. The space between the showers and the wash-basins which I have marked as "lobby" is used for drying purposes and on this morning, or the morning of the injury, contained piles of Turkish towels, that is, piled up on the floor. [540]

- Q. Doctor, the openings in the showers faced each other?
  - A. The openings in the showers faced each other.
- Q. And between the showers there was a passage-way ?
  - A. Between the showers there was a passageway.
  - Q. The walls of the showers were of marble?
  - A. Marble.

Q. And the basins were the porcelain Page 10. basins that you have referred to?

Page 11. A. Were the porcelain basins I have referred to, yes. They were the regular stock basins that you see in every plumbing store where they sell showers or bath-room supplies.

Q. They were built above the level of the floor for what purpose?

A. For the purpose of catching the water that comes from the shower overhead.

Q. Were the edges sharp or were they broad and round? A. They were round—smooth.

Q. There was a slight drop toward the center of

(Deposition of Dr. Barney R. Simons.) the basin for what purpose?

A. For the purpose of catching the water and not to permit it to flow out into the lobby of the shower-room.

Q. By the by, have you had any occasion to investigate these showers and porcelain basins of this type?

A. I have had occasion to investigate them because I intended to put them in my cottage in Massachusetts and I have observed that they are

Page 11. the stock basin.

Page 12. Q. Was this shower as constructed on the "Great Northern" the usual and modern type of stock basin in every particular?

A. The stock basin in every particular, yes.

Q. Both as to distance from the floor and to slope in the basin? [541]

A. In every particular, yes.

Q. Would you say from your inspection of it and your knowledge of these basins that the slope was only such as would carry and drain off the water?

A. Carry and drain off the water, yes.

Q. Those basins were about twenty-four inches square?

A. About twenty-four inches square. That made them over all about thirty inches.

Q. Did the two showers with the passage between them occupy the entire space on the end of the shower-room opposite the wash basins?

A. No, they did not.

Q. There are on either side of them-both star-

board and port—spaces otherwise utilized?

Page 12. A. Yes.

Page 13. Either for bathing or some other purpose? A. Yes, sir.

Q. So that your drawing is only-

A. Is only a drawing in a general way.

Q. And does not intend to represent the situation exactly?

A. It is exaggerated for the purpose of showing that portion which is pertinent to this case.

Q. What was the floor of the bath-room made of?

A. Tile—small tile blocks.

Q. What was the general condition of the tile and the showers as to state of repair?

A. I would say good.

Q. Why?

A. The ship was practically new and I used the showers myself for two or three mornings prior to this accident and the whole construction and all appealed very strongly to me. I saw nothing wrong with the shower, or the basin or the floor. [542]

It struck me as an | | admirable Page 13. shower. In every way in keeping with Page 14. the boat which was a beautiful ship.

Q. The ship was new itself and the shower-bath was also new and it so appeared?

A. Yes.

Q. What was its condition as to lighting?

A. It was lighted by electric lights and was well lit up.

Q. On the morning this accident occurred it was well lit up? A. Yes.

Q. About what time was the accident?

A. I should say between seven and eight o'clock in the morning. I didn't pay any attention to the time but I should say it was between seven and eight o'clock.

Q. You found the room adequately lighted and everything was perfectly visible?

A. Everything perfectly visible, yes.

Page 14. Q. What was the condition of the room Page 15. as to cleanliness?

A. I should say the room was clean. I saw no evidence of any soap used. There was no soap to be used except in the wash basins and the floor was covered here and there with Turkish towels. The floor between the passage of the two showers was wet as a result of people stepping out from under the shower with the water dripping from their persons but I wouldn't call that dirty.

Q. Except for the fact that the floor between the showers was wet with water, was there anything else on it. I mean between the basins or showers, was it perfectly clean?

A. Nothing else was on it. It was wet as a result of people stepping out from under the showers with water dripping from their persons.

Q. I mean was there anything other than water on it?

A. Not that I saw. I couldn't see anything but water. [543]

Q. And so far as you know it was clean?

A. So far as I saw it was clean.

Page 15. Q. Did you use the shower that day Page 16. after the accident?

A. After they got Mr. Hutchins out of the room I used the shower.

Q. You used the passageway between the showers?

A. I used the passageway to step into one of the showers.

Q. How did you find the floor of the passageway when you used it?

A. I didn't notice anything unusual. Same as it was the previous mornings.

Q. Clean? A. Clean, yes.

Q. Was it any more slippery than such slipperiness as comes from clean water on a clean floor?

A. No more so; no.

Q. Was the water there in any quantity or was it just merely the water which dripped from persons using the showers?

A. Just the result of the water dripping from the persons when they stepped from under the shower.

Q. The tile floor was not covered with a rubber mat was it?

Page 16. A. It was not, no.

Page 17. Q. Do you regard a rubber covering for a bath-room as sanitary?

(Mr. Pershing objects.)

Mr. YOCUM.—On what ground?

Mr. PERSHING.—Generally.

Mr. YOCUM.—I wish you would specify the par-

ticular character of your objection, if to the form of the question I will change the [544] form, if to the experience of the witness I will qualify him.

Mr. PERSHING.—I think the witness should be qualified.

Mr. YOCUM.—Q. Doctor, you have had medical experience and hospital experience and are familiar with principles of sanitation? A. Yes.

Q. In the practice of dentistry you have had to consider and study matters of infection,

Page 17. or sanitation, very carefully, haven't Page 18. | | you?

A. I have considered and studied care-

'Q. You have also, as you say, in conection with your own home, investigated the question of bathrooms, and showers and their equipment?

A. Yes.

fully.

Q. Now, I will renew my question and ask your opinion as to the use of a rubber floor or other floor of that type in connection with a bath-room used as this was, generally on a ship?

(Mr. Pershing still objects on the ground that the witness does not claim to have investigated the question of the use of rubber on bath-room floors on steamships where conditions are different than they are in ordinary domestic establishments.)

Mr. YOCUM.—Would you regard principles of sanitation of more importance on a steam-

Page 18. ship where a bath-room is used generally

Page 19. by travellers than in your home?

I would regard the principle of sanitation more important on a steamship than I would in my home because of peculiar conditions [545] on the steamship. I think it is much more difficult to keep a steamer in a hygenic condition than it would be in your home.

Mr. PERSHING.—Q. Would the fact, Doctor, of the motion of the boat in rough weather qualify your opinion as to the necessity of having rubber floor covering, as a matter of safety in spite of your opinion on the question of sanitation?

Mr. YOCUM.—I think that at the present state of the examination this question is objectionable, but the doctor may answer.

A. Well, that is a pretty hard question for me to answer. I have traveled on a great many steamers, but I don't remember seeing rubber mats on any of them, and I don't remember hearing of Page 19. anyone falling in the bath. This is the

Page 20. first time it has been brought to my attention.

Mr. YOCUM.—Q. Would you regard the use of rubber mats on the floor of a bath-room on a steamship such as the "Great Northern" as sanitary?

A. No, I would not regard them as sanitary as the tile floor.

Q. In your opinion would any rubber mat provide against slipping unless it was a mat which covered the entire floor?

A. I should say that if the mats were of good size they would help considerably. I say good sized in

(Deposition of Dr. Barney R. Simons.) proportion to the size of the room.

- Q. But a small mat would provide practically no protection? A. No.
- Q. You say that you have travelled extensively and that you have never seen rubber mats used on bath-room floors on shipboard? A. I never have. [546]
- Q. From your experience how would you regard the equipment of this shower-bath room, its showers, including its basins and general appurtenances, so far as you observed them on the day of the accident.
- Page 20. A. I would say they are first class.
- Q. There was no obligation on the part Page 21. of any of the passengers of the steamship to take a bath?

(Objected to by Mr. Pershing.)

A. No.

Q. Can you recall the date of the accident?

A. As near as I can remember it was the morning before the ship arrived at Hilo, and, I think that was the eighteenth of February last.

- Q. You had left the port of San Pedro and were on the way to Hilo? A. Yes.
- Q. What was the condition of the sea and weather at the time of the accident?
- A. The weather was bad and the sea was very rough.
  - Q. How do you recall that it was rough?
- A. Most of the night before I was laying there awake. It was so rough I couldn't sleep. I like

pied. That morning the steward called Page 21. me and said my bath was ready, and I Page 22. didn't want to go because of || the pitching and rolling of the ship. I told my wife I didn't think I would go, and she said, "You haven't missed a morning bath in a year and you may be sorry if you don't take one." And I got out very cautiously and went to the shower and supported myself with my hand on each side of the passageway—that is, on the wall of the passage—as I went along. It was impossible to walk straight, unassisted, with-

Q. When you entered the bath-room was Mr. Hutchins there?

out holding on to the sides of the passageway. [547]

A. Mr. Hutchins stood in the space between the two showers—the passageway between the two showers at a point where I have placed the X with a circle around it on the plan.

Q. Will you tell us just exactly what happened?

A. Mr. Hutchins stood where I have marked the plan with an X and a circle around it and as he was a large man he occupied practically the entire passageway so I couldn't enter the shower opposite the one in which he was tempering the water.

Page 22. I sat down on the stool marked on the Page 23. plan with a square and observed | Mr.

Hutchins until such time as he might get out of the passageway so I could enter the opposite shower. Mr. Hutchins stood with his left hand against the wall marked XXX on the plan and with

his right hand he was tempering the water—I might say, feeling the temperature of the water. The ship at about this moment lurched. At the same time Mr. Hutchins endeavored to step in to the shower. He stepped with his right foot forward, resting his weight on the left—

(By Mr. PERSHING.)

Q. Which one did he step into?

A. This one here-marked H on plan.

WITNESS.—(Continuing.) When his left foot slipped from under him and he fell with his left shoulder upon the edge of the basin of the shower marked S. He fell helplessly—I mean by that he had no chance to catch or save himself whatever, as he fell. I went to Mr. Hutchins' aid, that

Page 23. is, I dragged him out from his position,

Page 24. catching him by the feet. I got him into the lobby of the shower-room and found that he was unconscious.

(By Mr. YOCUM.)

Q. Do you recall whether he was rendered unconscious immediately by the fall? [548]

A. Well, I got him out immediately and he was unconscious. I would say that he was rendered unconscious by the fall. I called for aid by pressing the button provided for that purpose in the lobby of the shower-room and that call was answered by a ship steward. I told him that there was a man injured and to get the ship's surgeon immediately. The surgeon responded without undue loss of time—as quickly as he could get to that part of the boat—

but by the time the surgeon entered the room Mr. Hutchins had recovered consciousness. We assisted Mr. Hutchins to a stool resting his back and head against a side wall of the lobby. I offered to get some brandy, which suggestion was agreed to by the ship's surgeon but Mr. Hutchins refused to take it.

He complained of severe pain in the heart

Page 24. and shoulder. In fact he gasped these Page 25. words very inaudibly— || hardly a whis-

per—placing his right hand to his heart and then lapsed into an unconscious condition again and at this moment the ship's surgeon assisted by the steward and myself carried him out of the bathroom lobby down into the aisle when I let go my hold as there wasn't sufficient room for us three to hold him and pass. They started toward Mr. Hutchins' room and I presume they took him there.

- Q. At the time Mr. Hutchins fell he was in the act of stepping into the shower?
  - A. Basin. Stepping under the shower.
- Q. He slipped when his one foot was still in the passageway and the other was in the air?
  - A. Was in the air.
- Q. And it was the foot which was still in the passageway which slipped out from under him?

A. That is right.

Page 25. Q. And it occurred coincident with the Page 26. lurching of the ship?

A. Coincident with the lurching of the ship. [549]

Q. He stepped with which foot?

- A. With right foot resting his weight on the left.
- Q. As he stepped did he support himself against the side of the shower or did he just step in?
- A. I can't recall that. The last I can recall is where he stood with his left hand against the wall which I have marked with the three X's (XXX). I can't say whether or not he dropped this left hand as he started to step under the shower.
  - Q. He didn't support himself with the right hand?
- A. I didn't see that there was anything there to support him with the right hand.
- Q. Could he not have supported himself by placing his right hand against the side of the shower?
- A. He could have caught ahold of that marble slab. He could have caught ahold of the
- Page 26. slab on the after side of the shower marked Page 27. (Y) with || his right hand. Of course

I can't say what support that would have given him.

- Q. At the time of the accident I understand you to say it was very well lighted and all the conditions which existed were perfectly obvious to him?
  - A. Yes.
- Q. During the period you were in the shower-room there was evidence of the rough weather?
  - A. Yes.
- Q. The ship was pitching and rolling and lurching occasionally? A. Yes.
- Q. Do you recall whether there were supports or handles in the shower?
  - A. I don't remember seeing them. I think not.

Q. It is possible that they might have been there?

A. They might have been there but I don't remember seeing them.

Q. Did you see Mr. Hutchins subsequent

Page 27. to the accident? A. I did. [550]

Page 28. Q. When and where?

A. I saw him on the deck taking his usual exercise,—that is, his usual walking exercise, the afternoon of the morning of the accident and I stopped him and asked him how he felt. He said that he had heard that I helped him out from under the shower and he thanked me very cordially. I asked him how he felt. He said that he felt all right except that he felt rather bruised, a bit sore, but the doctor said there was no harm done except for the bruise and that he would be all right in a few days. I remarked that he fell rather hard. He said yes, he thought that the way his arm felt, but he would hold no grievance against the company if they would only provide some protection for passengers in the future.

Q. Did you see him later?

A. I saw him when we arrived at Hilo.

Q. Did you see him at all on the night of

Page 28. the accident? A. I did.

Page 29. Q. Where and under what circumstances?

A. Why, he took part in a mock trial aboard the steamer—acted as judge I think.

Q. Did he take part as all of the others in the performance?

A. He took part as all of the others. I think he acted as judge in that proceeding.

Q. Did he give any evidence of inconvenience?

A. No, he sat there and seemed to be in a very good humor. He was jesting and carrying on. He didn't give evidence of being hurt or inconvenienced. In fact, I remarked to my wife that he couldn't have been hurt very badly as he took an active part in this mock trial.

Q. You also saw him about at Hilo?

A. I saw him when he was going down the gangplank on the steamer. He went down just the same as he would under ordinary conditions. [551]

Q. Was his arm carried in a sling?

A. I didn't see his arm in a sling.

Page 29. Q. Physically he was a man with much Page 30. flesh about the shoulder?

A. Much flesh.

Q. Did you see him subsequently?

A. I saw him in the City of Honolulu—about possibly two days after my arrival there.

(By Mr. PERSHING.)

Q. How many days was this after the accident?

A. That would be three or four days after the accident.

Q. Was he carrying his arm in a sling then?

A. Yes, he then had his arm in a sling.

(By Mr. YOCUM.)

Q. Doctor, subsequent to the accident you took a bath?

A. I did. That is, shortly after we helped him

(Deposition of Dr. Barney R. Simons.) out of the lobby and into the passageway I went back and took a bath.

Q. How did you find it?

A. Nothing unusual about it except it was rough and I had to be careful.

Page 30. Q. Can you tell me whether you found it Page 31. any more slippery than is usual upon a tile floor of this type? A. No.

Q. You took your bath within fifteen minutes after the accident?

A. Less than that—no,—I spent probably fifteen or twenty minutes with Mr. Hutchins there getting the doctor and sitting him up on the chair. It was shortly after I—I returned right after I *left* go Mr. Hutchins and the doctor and steward took him to his stateroom.

Q. It was within a short time?

A. Within fifteen or twenty minutes after the accident? [552]

Q. And at that time there was no change in the condition of the floor? A. None whatever.

Q. You used the same passageway in which Mr. Hutchins had fallen? A. I did.

Page 31. Q. In your judgment, from the actual ob-Page 32. servation of the basin, was there any more slope in it than was reasonably necessary for drainage? A. No.

Q. In your judgment was the general construction of the showers and of the bath-room reasonably safe?

(Mr. Pershing objects, not on the ground that it is leading, but in general.)

- A. I should say, yes.
- Q. I understand you to say that no one else witnessed the accident? A. No one.
  - Q. No one else in the room? A. No one else.
- Q. The few towels that you say lying on the floor had absolutely nothing to do with the accident itself? A. No.
  - Q. Doctor, you said that Mr. Hutchins
- Page 32. had fallen very suddenly || without op-
- Page 33. portunity to catch himself as he fell.
  What do you mean by that?
- A. I mean that he didn't have an opportunity of getting his left hand under him to break the force of his fall.
  - Q. He fell suddenly.
- A. Yes, he fell without any possible way of catching or stopping himself. That is, he fell so quickly he couldn't get his hand out to save himself. It was simply as if you had pulled both legs from under him and he fell down. [553]
  - Q. No opportunity in time to do anything?
  - A. Yes.

Cross-examination.

## (By Mr. PERSHING.)

Q. Doctor, referring to your plan and the basin marked H, was that a glazed porcelain surface?

### A. Yes.

- Page 33. Q. Referring to the flooring in the pas-
- Page 34. sageway marked X with the circle was that a glazed floor, tile floor?
  - A. Glazed tile floor—the same as that of the lobby.

- Q. I understand that rubber curtains were hanging in front of the shower above the dotted lines?
  - A. Yes.
- Q. And that there was no handle on the marble side of the shower on the front where I have marked Y in a circle? A. No handle. That is right.
- Q. Now, when you first saw Mr. Hutchins standing at the point marked X with the circle, you say he had his left hand extended and against the rear wall marked with a triple X (XXX)?
  - A. That is right.
- Q. And his right hand was reaching into the shower space? A. That is right.
- Q. And you don't know whether at the time of his fall Mr. Hutchins still had his left hand Page 34. against the partition marked triple X Page 35. (XXX)? A. I don't know.
- Q. Do you know whether he had an opportunity to grasp the marble frame (Y) at all as he fell?
  - A. I don't think he had an opportunity to do so.
- Q. Do you know whether between the time of Mr. Hutchins' fall and the time you took your bath any of the attendants had [554] wiped up the floor in the lobby where Mr. Hutchins' fell?
- A. I do not know. It is possible they did or possible they did not. I don't know.
- Q. You have seen in bath-rooms on ships and elsewhere rubber mats placed on the floor of shower-baths and the approaches thereto?

Mr. YOCUM.—I object to this question because

(Deposition of Dr. Barney R. Simons.) of its inclusion of ships and other places. I have no objection if the reference is made to ships.

A. I have never seen them on ships. I have seen them elsewhere. I will qualify this by Page 35. saying I have seen them in bath-tubs on Page 36. ships.

Q. You have traveled extensively on ship-board. A. I have.

Q. Do you remember having seen on first-class steamers such as the "Great Northern" bath-rooms tiled in rubber tile?

A. I don't know that I have.

Q. Of what material was the rear wall marked triple X (XXX) constructed? A. Marble.

Q. Was it polished marble?

A. Polished marble.

Q. And the side wall at (Y) (Y with the circle), was that polished marble? A. Polished marble.

Q. Do you recollect whether the rubber curtains hanging over the dotted lines were pushed fore or aft at the time Hutchins was standing in

Page 36. front of that bath?

Page 37. A. I do not recollect.

Q. They did push both ways? A. Yes.

Q. Then you don't know whether he could have grasped the rubber curtains?

A. That wouldn't have saved him if he did. [555]

Q. When you arrived in the lobby of the bath-room Hutchins was the only other person there, I believe?

A. The only other person there.

Q. No attendant was in sight?

- A. No attendant was in sight.
- Q. I understood you to say that you do not recollect seeing any handles on the side wall or rear wall marked triple X (XXX).
  - A. I don't recall seeing any handle there.
  - Q. And if it had been you would have seen it? (Objected to by Mr. Yocum.)

A. Well, I couldn't say that because it didn't interest me. I myself didn't have occasion to use it.

Q. You saw Mr. Hutchins on the after-Page 37. noon of the day, the morning, of the acci-Page 38. dent on deck? A. That is right.

Q. And you had some conversation with him? A. I did.

Q. Was any reference made at the time by him at all as to the question of handles on the wall marked triple X (XXX)?

(Mr. Yocum objects on the ground that the question is immaterial, improper and irrelevant.)

A. No reference was made.

Q. Did you have after the accident any occasion to examine as to whether there were or were not handles on the wall marked triple X (XXX)?

A. I had no occasion.

Q. Did any discussion or reference to such handles take place between Hutchins and yourself at your subsequent meetings?

A. Not in relation to handles, no.

Q. What did the ship doctor say to you Page 38. when he arrived immediately || after the Page 39. accident?

(Objected to by Mr. Yocum as immaterial, improper and irrelevant.)

A. He didn't say anything I can recall. I told him when he entered what happened. [556]

Q. Did he ask you for any general description or history of the accident? A. No.

Q. He immediately took charge of the case?

A. He took charge of the case.

Q. Did you have any subsequent discussion with him about the seriousness of this accident?

(Objected to by Mr. Yocum.)

A. I stopped him as he passed me on the deck and asked him how his patient was.

Q. When?

A. Possibly two hours after the acci-Page 39. dent.

Page 40. Q. And what was his reply?

A. He said that he is geting along very nicely. That he was badly bruised. That he gave him a hyperdermic and he came around all right. That was the sum and substance of our conversation.

Q. Nothing was said by him or by you as to whether there was a broken bone in the arm?

(Objected to by Mr. Yocum.)

A. No.

Q. He didn't say whether he had made any examination to determine whether or not there was a bone broken?

(Objected to by Mr. Yocum.)

A. His conclusion was that Hutchins' arm was just a bit bruised.

Q. Doctor, in direct examination you stated that you had made some study of the sanitary questions arising on the use of rubber mats in bath-rooms. Would you say that conditions on shipboard in rough weather would qualify your opinion as to the use of such mats and that where rough weather was to be [557] expected that the question of safety would be more important than the question of

Page 40. sanitation?

Page 41. A. No, I say the question of safety would be more important.

Q. Doctor, was the floor of the passageway a level one or did it have a slope?

A. Slightly crowned.

Q. So that it was a little higher in the center where Hutchins stood than it was at the edge of the baths?

A. A little higher.

Q. And the basins were a little lower? Several inches lower?

A. Are you referring to the center of the basins?

Q. Yes.

A. I should say two inches lower than the upper edge of the basin.

Q. By the upper edge you mean the line along the dotted line?

A. The line of the basin. Yes.

Q. I understand, however, that Hutchins had not yet placed his foot into the basin when he fell?

A. That is my observation. His foot Page 41. had not been put down in the basin. It Page 42. had been raised in the air in the act of

stepping in and was over the basin line.

- Q. Did you notice during the mock trial the evening of the day of the accident, whether Mr. Hutchins was using his left arm?
  - A. I did not notice.
- Q. That entertainment, I suppose had been arranged in advance?
  - A. It was arranged in advance.
  - Q. I suppose he participated by arrangement?
  - A. By arrangement. [558]

(By Mr. YOCUM.)

- Q. You said there may have been no opportunity for Mr. Hutchins to support himself. Of course, the presence or absence of a handle on the far side of the shower compartment was absolutely immaterial as this accident happened.
  - A. He never could have reached it if it was there.
  - Q. How long a time elapsed after you reached the shower-bath to assist Mr. Hutchins

Page 42. toward his stateroom until you returned Page 43. to take your shower?

A. Probably two minutes.

- Q. When you came back you saw no one in the room making any attempt to clean up?
- A. No. The steward answered my call and assisted the doctor in carrying the injured man to the stateroom. There was no one there after I went to take my shower.
  - Q. You saw no one else come in?
  - A. No one came in.

- Q. Was the shower-bath room within your observation all that time?
- A. Well, I had my back to the lobby of the shower-room but there might have been some one in that got in and out. But if it did happen it happened within two or three minutes' time.
- Q. Doctor, how much water was on the tile floor in the passageway between the showers?
- A. The entire passageway I should say was drained off owing to the crown of this Page 43. passageway.
- Page 44. Q. Whatever the conditions were they were perfectly obvious to you?
  - A. Yes.
- Q. And they were perfectly obvious to anyone who would look for them?

(Objected to by Mr. Pershing).

- A. Yes. [559]
- Q. You said that the porcelain was glazed and the tile floor was glazed. That is the usual construction?

A. The usual construction, yes.

(By Mr. PERSHING.)

Q. Doctor, in your redirect examination, Mr. Yocum asked you a question as to the possibility of reaching a handle on the inside wall of the shower and you said he couldn't have reached it, did you refer to a handle that might have been on the wall?

#### A. Yes.

Page 44. Q. Then, as I understand it, there was

Page 45. still no reason why Hutchins should not have reached and held himself by one on the triple X (XXX) wall?

A. If there was a handle there he could have held on to is. Most any one would because that would have been the only security he had and the only available one.

Q. So that a handle at any other place than on the wall marked triple X (XXX) or the point marked (Y) would not have been available to him?

A. That is right.

(By Mr. YOCUM.)

Q. But whatever the conditions may have been on the wall marked triple X or at the point marked (Y), they were all perfectly obvious to any one using the shower? A. Yes.

Recross-examination.

(By Mr. PERSHING.)

Q. Doctor, was there a rubber mat in the

Page 45. small hallway between the two showers? Page 46. A. There was not.

Q. Were there any rubber mats in the shower-bath? A. No.

Q. Or any rubber mats in any part of the lobby?

A. No. [560]

(By Mr. YOCUM.)

Q. Doctor, you have told both our office and Mr. Pershing's office the facts of the case prior to your testimony and have merely stated the facts as you recalled them? A. Yes.

(Signed) BARNEY R. SIMONS.

Sworn to and subscribed before me this 20th day of October, A. D. 1916.

[Seal] (Signed) WM. H. WHITAKER, Commissioner.

I, William H. Whitaker, a notary public of the commonwealth of Pennsylvania, residing in Page 46. the city of Philadelphia, Commissioner || Page 47. herein, do hereby certify that in pursuance of the annexed commission to take testimony issued to me out of the United States District Court for the Territory and District of Hawaii dated the 28th day of July, A. D. 1916, I caused the said B. R. Simons, the witness named in the said Commission and whose name is subscribed to the foregoing deposition, to appear before me on the twenty-eighth day of September, A. D. 1916, after giving due notice to counsel for all parties concerned, as specified in said commission to me; that previous to the commencement of the examination of the said B. R. Simons, he was sworn by me according to law, to testify the truth, the whole truth, and nothing but the truth, relative to the matters in controversy in the said cause now pending and undetermined in the United States District Court for the Territory and District of Hawaii between Clinton James Hutchins, Libellant, and the American Steamship "Great Northern," and A. Ahman, Master and Claimant of said Steamship, so far as he should be interrogated concerning the same; that Page 47. the said deposition was taken at the offices Page 48. of Messrs. Biddle, Paul & Jayne, | At-

torneys, 505 [561] Chestnut Street,

Philadelphia, Pennsylvania, on the twenty-eighth day of September, A. D. 1916, between the hours of 10 o'clock A. M. and 1 o'clock P. M. of said day, and was reduced to writing by me, who am neither of the parties in said suit, nor the attorney of either, nor interested in the event of the same; that after said deposition was taken by me as aforesaid, the interrogatories and the answers thereto of said witness as written down were read over by said witness and that thereupon the same were duly signed and sworn to by the said witness, B. R. Simons, before me, at the place and on the day and year aforesaid.

IN WITNESS WHEREOF, I have hereunto est my hand and affixed by Notarial seal this 20th day of October, A. D. 1916.

[Seal] (Signed) WM. H. WHITAKER, Commissioner,

Notary Public of the Commonwealth of Pennsylvania, Residing in the City and County of Philadelphia.

Page 48. Commission expires March 9, 1919. [562]

In the District Court of the United States, in and for the Territory and District of Hawaii.

#### IN ADMIRALTY—LIBEL IN REM.

No. 147.

CLINTON JAMES HUTCHINS,

Libelant,

VS.

The American Steamship "GREAT NORTHERN,"
Her Tackle, Apparel, Furniture, Boats and
Appurtenances and Against All Persons Having or Claiming to Have Any Interest Therein
and Against All Persons Lawfully Intervening
in Their Interest Therein,

Libelee,

and

A. AHMAN,

Master and Claimant.

#### Depositions.

BE IT REMEMBERED that on Saturday, October 21st, 1916, and on Monday, October 23d, 1916, to which date an adjournment was regularly taken, at my office in the Merchants Exchange Building, 465 California Street, in the city and county of San Francisco, State of California, in pursuance of the stipulation hereinafter set forth, personally appeared before me, Ira A. Campbell, designated as commissioner, Francis G. Lefebre, a witness called on behalf of the libelant and J. B. Morris and William Paul Metzler, witnesses called on behalf of the claimant.

593

John H. Smith, Esq., appeared as proctor for the libelant, and Charles H. Carey, Esq., of the firm of Carey & Kerr, appeared as proctor for the claimant, and the said witnesses having been by me first duly cautioned and sworn to testify the truth, the whole truth and nothing but the truth in the cause aforesaid, did thereupon depose and say as is hereinafter set forth. [563]

(It is hereby stipulated that the testimony of Francis G. Lefebre, a witness for libelant in this case and J. B. Morris and William P. Metzler, witnesses for claimant, may be taken at this time before Commissioner Ira A. Campbell, in accordance with the stipulation entered into by and between the proctors for libelant and libelee on June 10, 1916, and in accordance with the order and commission to take testimony issued in pursuance of that stipulation by the Judge of the United States District Court for the Territory of Hawaii, dated June 13, 1906, and in accordance with the commission to take testimony issued by the clerk of said court on the 13th of June, 1913.

It is further agreed that owing to the fact that the Commissioner has already returned his commission as to depositions already taken, that these depositions may be considered as having been taken in pursuance of said order and commission and stipulation, and that the same may be returned by the commissioner as a part thereof.) [564]

## Deposition of Francis G. Lefebre, for Libelant.

FRANCIS G. LEFEBRE, called for the libelant, sworn.

Mr. SMITH.—Q. What is your full name?

- A. Francis G. Lefebre.
- Q. Where do you live?
- A. 162 Lengton Street, San Francisco.
- Q. Were you employed on the steamship "Great Northern" in the early part of the year 1916?
  - A. Yes.
  - Q. In what capacity?
- A. I was a waiter, and afterwards I was chief engineer's steward; that means, to take care of the chief engineer's room, and I had a few rooms to take care of, too.
- Q. When did you go to work on the steamship "Great Northern"? A. On October 1, 1915.
  - Q. How long did you work?
  - A. I left there on April 21, 1916.
- Q. During all of that time were you employed on the ship?
- A. Except on one trip, which was at the end of December, 1915.
- Q. Were you on the steamship "Great Northern" on the trip made from San Francisco to Honolulu, leaving San Francisco about February 14, and arriving in Honolulu about February 21? A. Yes.
- Q. At that time what were your duties on the ship, on that voyage?
  - A. I was the chief engineer's steward.
  - Q. What was the chief engineer's name?

A. G. D. Morris.

Q. Did you see Mr. Hutchins, the libelant in this case, on that trip?

A. I was working on the table, on the chief engineer's table, and Mr. Hutchins was one of his guests.

Q. Did Mr. Hutchins eat at the chief engineer's table on the entire voyage? A. Yes.

Q. And you waited upon him, did you? A. Yes.

Q. Among other guests?

A. I could not tell you how many. I also waited on Mr. Doyle; I think he was a real estate man in Honolulu.

Q. Do you remember the time that Mr. Hutchins had an accident and hurt his arm in one of the shower-rooms on the steamship "Great [565] Northern"? A. Yes.

Q. How do you remember that occasion?

A. Well, one morning Mr. Hutchins did not come down for breakfast, and his wife came down, and I asked, of course, why Mr. Hutchins did not come down, so she said he had an accident. The next day he came down for lunch in the dining-room, and he had his arm in bandages, and so I asked him what was the matter.

Mr. CAREY.—I do not think the witness can testify to what Mr. Hutchins told him.

Mr. SMITH.—We do not ask that he should.

Q. Do you remember about what time this was?

A. I think it was along about the 18th of February.

Q. 1916? A. Yes.

Q. You got into Honolulu about what date on that

(Deposition of Francis G. Lefebre.) trip? A. On the 23d of February.

Q. When did you next see Mr. Hutchins?

A. Well, I saw him the next time when he came down on the boat, when the Shriners went down to Honolulu; I saw him the day before sailing.

Q. You saw him where?

A. He came down on the ship.

Q. But where was this? A. In Honolulu.

Q. About what time was this, about what date?

A. Well, it was the big time, you know the time the Shriners went down to Honolulu.

Q. How long after the other trip that you made when you met Mr. Hutchins; how many trips?

A. Mr. Hutchins went down to Honolulu on the "Great Northern," leaving San Francisco on the 16th, I believe, and then it was two trips afterwards; it should be at the end of March.

Q. 1916? A. Yes.

Q. You said Mr. Hutchins came aboard the steamship "Great Northern"? A. Yes.

Q. What did you and Mr. Hutchins do, if anything? [566]

A. Mr. Hutchins knew me already; he asked me to show him around the shower-bath; like every boy working on a ship, I had a pass-key, so I opened this door and him and I went inside the shower-bath, and then he asked me—

Q. (Int.) What shower-bath did you go to see?

A. It was on the C deck.

Q. Of the steamship "Great Northern"?

A. Yes; he asked me to see for myself that there

(Deposition of Francis G. Lefebre.) was no handle on the wall.

Q. On the wall of what?

A. On the wall of the shower-bath, you know, a big, square thing—on the wall against one side of the shower-bath there should be—I don't know whether there should be, but he says there should be a handle; that means that when the ship rolls you can hold yourself on it.

Q. Did you look at the shower-bath on deck C of the "Great Northern" at that time in the presence of Mr. Hutchins? A. I did, yes.

Q. Was there a handle on the back wall of the shower-bath? A. No, there was not.

Q. Did you have any conversation with Mr. Morris about this? A. Yes.

Q. What was said?

Mr. CAREY.—I object to the conversation on the ground it is incompetent.

Mr. SMITH.—You may state what the conversation was.

A. I went to the chief engineer's room and I told him—

Mr. CAREY.—Just when was this?

A. That was the same day that Mr. Hutchins came down to the boat, and right after that—

Mr. SMITH.—Q. The same day you looked at the shower-bath?

A. Yes; and right after that I went in the chief engineer's room and I told him that Mr. Hutchins came down, and he asked me what [567] for; "Well," I said, "he wants to see the shower-bath, to

see for himself that there was no handle"; so Mr. Morris said, "There must be one," I said, "Mr. Morris, Mr. Hutchins and I just looked and we did not see any"; so Mr. Morris said, "There must be one." I says, "If you don't believe me, come and see," and so he went to see in the shower-bath.

- Q. Did you and Mr. Hutchins go back with him?
- A. No; I showed him myself.
- Q. You said to him what?

A. I showed him myself; I went inside the shower-bath, and I said,—I showed him that there was none.

Mr. CAREY.—Q. Who went with you?

- A. The chief engineer came with me.
- Q. Mr. Morris? A. Yes.
- Q. Who else? A. Nobody else.

Mr. SMITH.—Q. What did Mr. Morris say, if anything? A. There should be one.

- Q. Was there any mat on the floor?
- A. No, no mat.

#### Cross-examination.

Mr. CAREY.—Q. What are you doing now?

- A. I am working in the Oakland Hotel.
- Q. What kind of work? A. I am a waiter.
- Q. How long have you been working there?
- A. I started last Saturday.
- Q. Where were you working before that?
- A. I was working down in Del Monte.
- Q. When did you start working at Del Monte?
- A. I started working in Del Monte the 10th of June, 1916.
  - Q. How long did you work there?

- A. I worked there until the 1st of October, 1916.
- Q. What place? A. Hotel Del Monte. [568]
- Q. What were you doing there?
- A. I was a waiter.
- Q. What did you do from October 1, 1916, till last Saturday, when you went to work at the Hotel Oakland? A. I was not doing anything.
  - Q. Where were you during that time?
- A. I was nowhere; I was just taking a rest in Frisco.
- Q. What were you doing from the time you left the steamship "Great Northern" in the winter of 1916, until the 10th of June, 1916?

Mr. SMITH.—He did not leave the "Great Northern" in the winter of 1916. He gave the exact date.

Mr. CAREY.—Q. When did you leave the steamship "Great Northern"? A. On April 21, 1916.

- Q. What did you do after you left?
- A. After I left I went down to Los Angeles for a few days, and I came back and I worked a few days at the St. Francis Hotel, and besides this I went to Del Monte for four days, which was at the end of May, and I went back on the 10th of June.
- Q. Let us see: Between April 21, 1916, and June 10, 1916, you worked a few days, you say, at the St. Francis Hotel? A. Yes.
  - Q. And a few days at Del Monte Hotel?
  - A. Yes.
  - Q. How many days, altogether, did you work?
- A. Well, maybe about five days; I tell you the last days, the time I worked in San Francisco, before the

10th of June, because I left San Francisco to go to Del Monte—before that time it was around the end of May I was working. Where did I tell you before I was working five days?

Q. Don't you remember?

A. I told you the Oakland Hotel. I mean San Francisco and Del Monte; that is right, before I went to Del Monte for five days I was working.

Q. You are sure of that, are you?

A. I am sure. [569]

Q. Who hired you there?

A. Mr. John Guillard.

Q. Have you got that down in your book?

A. No, I have not got that down.

Q. You are using a memorandum-book here to note the days when you were working for the steamship "Great Northern." What is that black book?

A. It is my union book. What I am showing you is my discharge from the "Great Northern."

Q. After you left the steamship "Great Northern" on April 21, 1916, you had no steady employment until June 10, when you went to work regularly at the Del Monte Hotel; is that it? A. That is it.

Q. And you worked there until October, 1916?

A. Until October, 1916.

Q. And then you did not do any other work until when?

A. I did not do anything at all until last Saturday.

Q. How long were you out of employment at that time?

A. About twelve or fourteen days, I believe.

- Q. Now, did you ever work on any steamship before you were on the "Great Northern"? A. Yes.
  - Q. What steamship?
- A. I came over from New York last year, in September, 1915, on the steamer "Kroonland."
  - Q. How did you get to San Francisco?
  - A. She got there; she came over there.
  - Q. You came on her to San Francisco? A. Yes.
  - Q. When did you get here?
  - A. I got here in the middle part of September.
  - Q. 1915?
- A. Yes; and I got that job on the "Great Northern" three days after that.
  - Q. When did you tell Mr. Hutchins about this?
  - A. About what?
- Q. About what you are going to testify in this case?
- A. I met Mr. Hutchins at the corner of Powell and Market once when I was off; once when I was off at that time, I was with a friend [570] of mine, and Mr. Hutchins stopped me and asked me where I was living, that he would like to see me; he asked my address and I went to see him afterwards; then he told me that he would like me to testify in this case.
  - Q. When was that?
- A. I was still working on the "Great Northern" because I came back—I think I was working on the "Great Northern" I could not tell you, but I think so.
  - Q. Did you tell Mr. Morris about that?

A. I did not; but I told Mr. Morris—Mr. Morris did not know anything at all until yesterday; Mr. Morris has always been very nice to me, and once I said I was very sorry to go against him, because he was a builder of two ships, and I did not feel like going against him, but yesterday I phoned him and I told him that I was going to testify in Mr. Hutchins' case. "Well," he said, "It is up to you, but I hope you will only tell the truth." I says, "Certainly, Mr. Morris, I will tell the truth." He said to me, "You know very well the handles were there four months before the accident happened." I said, "Mr. Morris, I give you my word that the handles were not there, for Mr. Hutchins and I went in the shower-bath and looked for them."

- Q. You are a native of what country?
- A. France.
- Q. How old are you? A. I am 22.
- Q. Were you a waiter in your own country before you came here? A. No.
- Q. Was your first work of that kind on the "Kroonland"?
- A. No; I will tell you, I started to work in a hotel in England.
  - Q. When was that?
  - A. It was five or six years ago.
- Q. Five or six years ago, when you were quite a boy?
- A. Yes; I left my home and I went to England, and ever since that I have been traveling all over the world.

- Q. Are you a married man? A. Yes. [571]
- Q. Do you live with your family?
- A. No, I live with my wife and mother.
- Q. Where do they live?
- A. 162 Lengton Street.
- Q. Did they come out with you at the same time from France? A. No; my wife is an American.
  - Q. Married since you came to San Francisco?
  - A. Yes.
  - Q. When did your mother come?
  - A. My mother isn't here.
- Q. I thought you said you lived with your wife and mother?

  A. My wife and her mother.
  - Q. When were you married?
  - A. I was married on the 21st of January, 1916.
- Q. That is when you were running on the "Great Northern"?
- A. At the time I laid off; as I told you, I laid off one trip; that is the time I laid off.
  - Q. That is when you were married? A. Yes.
- Q. Now, you have not had any steady work from April, during the spring, until in June, when you went to Del Monte?
- A. I will tell you; I worked very hard for eight months on the "Great Northern," and of course in the summer I didn't work for nothing, so I took a rest; in April I got that job at Del Monte; that means I was to go to Del Monte the end of May, I mean in the middle part of May, but I did not go, because there was not much business over there, so, of course,

I didn't want to take any steady job, because I knew I was going to go there any day.

- Q. 162 Lengton Street, San Francisco, is your correct address? A. Yes.
  - Q. Do you board or keep house?
  - A. We keep house.

#### Redirect Examination.

Mr. SMITH.—Q. What did Mr. Morris say, if anything, to you after you made the statement to him that you were coming here to-day [572] to give your deposition in the case of Hutchins vs. the "Great Northern"?

Mr. CAREY.—I object to the conversation as incompetent.

A. I phoned to him; he said, "Well, Francis, I hope you will tell the truth." I said, "Certainly, Mr. Morris, I will tell the truth." "Well," he said, "You know very well the handles were there." And I says, "Mr. Morris, I give you my word that the handles were not there when Mr. Hutchins and I went in the bath-room, in the shower-bath." "Well," he said, "Francis, if you testify that way it might drive you to jail."

#### Recross-examination.

Mr. CAREY.—Q. Is that all he said?

A. That is all he said.

Q. A while ago you testified that he said that you knew that these handles were there at least four months before the accident happened? A. Yes.

Q. Did he say that? A. He said that.

- Q. You didn't say that just now.
- A. He said another thing I forgot to tell you; he said, "We have got depositions from the man who put the handles in there four months ago, before that thing happened."
  - Q. You did not say that either.
  - A. He said that to me.
- Q. You did not say that a while ago when you were testifying.
- A. Didn't I tell you he had the depositions from the man four months ago?
- Q. No. What else have you forgotten about this conversation?
- A. He said to me at last—he said, "Francis, it is up to you." He said, "If you go up in this case you may get yourself in trouble."
  - Q. You did not say that before, did you?
  - A. I forgot.
- Q. What else did he say that you have forgotten and want to put in. Can you add anything else?
- A. No. A friend of mine was working [573] as a bell boy over there-
- Q. (Intg.) Never mind. I am asking you about what Mr. Morris said in this conversation. What else did Mr. Morris say? A. That is all.
  - Q. Did he say anything else? A. No.
  - Q. When did you talk with him?
- A. Yesterday afternoon about the same time as now.
  - Q. Did you come from Del Monte to testify here?
  - A. Yes; Mr. Grant told me at first that I should be

here on the 2d—was it on the 2d of October—on Monday, that is right, on the 2d of October—before I went to Del Monte, Mr. Hutchins told me that I should be here on the 2d of October, and before I left Del Monte Mr. Grant wrote to me that there was no use for me to be here at that time, because the gentleman couldn't be there until the 21st.

- Q. When did you leave Del Monte to come up here?
  - A. I left Del Monte on Sunday, the 1st of October.
- Q. What have you been doing from the first of October until to-day?
- A. I have not been doing anything up to last Saturday; I took about ten days rest.
- Q. Did you leave Del Monte to come up here on the 2d of October to testify in this case?
- A. I did not, because Mr. Grant wrote to me that there was no use for me to be here.
  - Q. What day did you leave to come up here?
  - A. I left on Sunday, the 1st of October.
  - Q. You came to San Francisco, at that time?
  - A. Yes, at that time.
- Q. And you have been waiting to testify every since, have you?
- A. Yes, I was not working at all, because I knew it was for the 21st.
- Q. You knew you would not be wanted to testify until the 21st?
  - A. Until the 21st, yes. [574]
  - Q. So you did not do any work in the meantime?
  - A. Yes, I did; I just told you I am working now.

- Q. Last Saturday, you went to work?
- A. Yes.
- Q. This is Saturday, that was a week ago you went to work? A. Yes.
- Q. What did you do the two weeks before that in October?
- A. I took a rest; I was working for 15 hours a day before, and I thought I could take a rest.
  - Q. When did you see Mr. Hutchins about that?
  - A. What do you mean, this time?
  - Q. Yes.
- A. I saw him about two days after I came back from Del Monte.
  - Q. Is that the only time?
- A. That is the only time; I went to see Mr. Grant—he told me to go and see Mr. Grant, and I went up to see him once, and he told me to be there on the morning of the 21st.

Mr. SMITH.—You mean Mr. Grant Smith when you say Grant? A. Yes. [575]

Monday, October 23, 1916.

### Deposition of J. B. Morris, for Claimant (Recalled.)

J. B. MORRIS, recalled for the claimant.

Mr. CAREY.—Q. Do you know Francis G. Lefebre?

Mr. SMITH.—Before you examine this witness, I would like to ask if you recall him for some particular purpose.

Mr. CAREY.—Yes, on account of the testimony of Francis G. Lefebre.

Mr. SMITH.—In order to contradict statements made by Francis G. Lefebre?

Mr. CAREY.—Yes.

Mr. SMITH.—Do you mean statements brought out on direct examination or cross-examination?

Mr. CAREY.—Both.

- Q. Do you know Francis G. Lefebre?
- A. Yes.
- Q. Do you remember having a conversation with him about the end of March, 1916, on board the steamship "Great Northern," when she was in the port of Honolulu, with relation to the shower-bath that had been used by the libelant, Mr. Hutchins?
  - A. No.
- Q. Do you recall having gone with Mr. Lefebre to look at that shower-bath on any occasion?
  - A. No.
- Q. As a witness, he testified that you accompanied him to the shower-bath in question and he pointed out to you the fact that there was no handle on the wall of the shower at that time. What is the fact as to that?
- A. None, whatever; I do not remember any trip of that kind.
- Q. Did you at that time, or any other time, say to him there should be a handle?
  - A. No, not that I remember.
- Q. What is the fact as to whether or not there was a handle in the [576] shower-bath at the time Mr.

Hutchins used the shower-bath?

- A. There was a handle in the shower-bath at that time.
- Q. On the subsequent voyages of the "Great Northern," what is the fact as to whether or not there was a handle in that shower-bath?
- A. There was a handle in that shower before the accident occurred.
- Q. Mr. Lefebre testified as follows: "Yes, and right after that I went in the chief engineer's room and I told him that Mr. Hutchins came down and he asked me what for. 'Well,' I said, 'He wants to see the shower-bath, to see for himself that there was no handle;' So Mr. Morris, said, 'There must be one.' I said, 'Mr. Morris, Mr. Hutchins and I just looked, and we did not see any.' So Mr. Morris said, 'There must be one.' I says, 'If you don't believe me, come and see,' and so he went to see in the shower-bath.' What is the fact about that?
- A. Well, I do not see any fact at all; I think it is just a falsehood.
- Q. Now, did he at that time or any time show you the shower-bath? A. No.
- Q. He testified, "I showed him myself; I went inside the shower-bath and I said—I showed him that there was none." What have you to say about that?
- A. Well, all I can say is it must be a falsehood; I know absolutely nothing about it.
- Q. Now, did the witness Lefebre call you by phone a few days ago prior to the time he testified in this case?

A. Yes, he called me up, I think it was Saturday, Saturday afternoon.

Mr. SMITH.—Just ask your question; I want to have an opportunity to object.

Mr. CAREY.—Q. The witness Lefebre testified as follows:

"Q. Did you tell Mr. Morris about that? A. I did not; but I told Mr. Morris-Mr. Morris has always been very nice to me, [577] and once I said I was very sorry to go against him, because he was a builder of two ships, and I did not feel like going against him, but vesterday I phoned him and I told him that I was going to testify in Mr. Hutchins' case. 'Well,' he said, 'It is up to you, but I do hope you will only tell the truth.' I says, 'Certainly, Mr. Morris, I will tell the truth.' He said to me, 'You know very well the handles were there four months before the accident happened.' I said, 'Mr. Morris, I give you my word that the handles were not there, for Mr. Hutchins and I went in the shower-bath and looked for them.' "Did you have that conversation with Mr. Lefebre?

Mr. SMITH.—I object to the question on the ground that it is immaterial, irrelevant and incompetent, and particularly on the ground that counsel seeks to contradict the witness on testimony brought forth by himself on cross-examination which had not been developed on direct examination.

A. Not exactly that. Saturday the boy called me up, and, of course I did not know who it was that was talking until some time; he told me it was Francis.

So I said, "Francis who?" He said, "Francis that used to be your boy on the ship." And I got the impression from his conversation that—

Mr. SMITH.—I object to the witness testifying to any impressions.

Mr. CAREY.—State what he said.

A. He told me that Mr. Hutchins wanted him to testify that the handles were on the ship while he was my boy there.

Q. Were on the ship, did you say?

A. That they were not on the ship, rather; so, I says to him, I says, "Why, Francis, if you want to testify to anything like that"—I want to say that I got the impression from the conversation—

Mr. SMITH.—We object to the impression. [578]

A. (Continuing.) It was a telephone conversation, you know.

Mr. SMITH.—You may state just what occurred, and the Court will draw the inference as to the impression.

A. He was explaining to me the fact that he liked me very much—

Mr. SMITH.—The witness will please state exactly what Lefebre said.

Mr. CAREY.—State as near as you can in his language what he said: Give us the conversation as you remember it.

A. He says, "Mr. Morris, you know I have always liked you very much, and I would not like to testify against you; but," he says, "Mr. Hutchins has been a very good friend of mine, and procured me the

position at the Del Monte Hotel." And he says, "I don't know whether I should testify or not." I said, "Certainly you should not, because you will be telling an untruth," I says, "Those handles were on the ship"—I did say four months, not having in mind just how exactly how long they had been there at that time; and I says, "If you would testify to anything like that you would certainly go to jail for it." I also told him that if he did testify, to tell the truth, no matter who it hurt. Do you wish me to say anything more about it?

Mr. SMITH.—It is understood, is it, Judge Carey, that the objection I have made goes to all the testimony?

Mr. CAREY.—If you desire it so.

Mr. SMITH.—I wish that first objection that I made to go to all his testimony, that is, that it is immaterial, irrelevant and incompetent, and that you are seeking to contradict a witness concerning matters brought out by you on cross-examination.

Mr. CAREY.—Q. Did he say, "I give you my word that the handles were not there, for Mr. Hutchins and I went in the shower-bath and looked for them"?

A. No, I don't remember anything of that kind at all. [579]

Mr. CAREY.—That is all.

Mr. SMITH .- No cross-examination.

# Deposition of William Paul Metzler, for Claimant.

WILLIAM PAUL METZLER, called for the claimant, sworn.

Mr. CAREY.—Q. Do you know the libelant, Mr. Hutchins? A. I know him by sight, yes.

- Q. Were you on the voyage to Honolulu at the time he was injured in a shower-bath?
  - A. I was.
- Q. Do you recall the occasion, or did you know of it at that time? A. Yes, I recall it.
  - Q. Did you see Mr. Hutchins at that time?
  - A. I did.
- Q. At that time did you have any position with the steamship company?
- A. Yes, I was acting as special agent on the boat; that is, special officer.
- Q. Will you state whether or not after you heard of this accident you examined the shower-bath that had been used by Mr. Hutchins? A. I did.
- Q. What was the fact as to whether or not there was a grab handle in the back of that shower-bath at that time? A. There was handle.
  - Q. What examination did you make of the bath?
- A. I tried the lever, that is, the combination lever operating the hot and cold water, and looked over the flooring, and noticed that there was a grab-iron on the back slab.
- Q. What was the occasion of your examining the bath?

(Deposition of William Paul Metzler.)

- A. When I heard of the accident I went in to examine it.
- Q. Will you state whether that was within the duty of your position on the boat, to make such an examination?
- A. Yes, partially, and the house doctor's also. [580]

#### Cross-examination.

- Mr. SMITH.—Q. Are you now working on the steamship "Great Northern"? A. Yes.
  - Q. What is your position? A. Special agent.
- Q. Have you been on the boat continuously from the time Mr. Hutchins was hurt in February, 1916?
  - A. Yes, during that trip.
  - Q. Have you been on every trip with the boat?
- A. With the exception of one during the winter; there was one trip that I was not on her.
- Q. Were you in San Francisco when the boat came in here on the 31st of July, 1916? A. Yes.
- Q. You knew at that time, did you, that the captain and chief engineer and other employees of the ship were giving their depositions here before Mr. Campbell?
- A. No, I did not; I heard that Mr. Hutchins had started an action against the company; that was all I heard; that was through the newspapers.
- Q. Didn't the captain or chief engineer, or someone of the officers on the ship, tell you that they were going to give their depositions when they arrived here on the 31st of July? A. No.
  - Q. Didn't you know that five or six or seven men

(Deposition of William Paul Metzler.) of the boat were off duty for that purpose?

- A. I did not.
- Q. Where were you at that time?
- A. That is hard to say, because my duties take me on the dock, through the boat; I might have been on the dock when they went ashore; you see, my duties compel me to watch the freight, the handling of it.
- Q. Did you make any report of your examination of this shower on the steamship "Great Northern" along the 18th of February, 1916?
- A. I made a verbal report of Mr. Relf; he questioned me about it; he questioned me about whether or not there were any handles on the showers. [581]
- Q. What made you go and look to see if there were any handles on the day that Mr. Hutchins was hurt?
- A. Well, I did not go particularly to notice whether there were any handles or not.
  - Q. Nobody had said anything about handles?
- A. No; I went in to look over the shower, to see if there were any defects.
- Q. How did you know that there were any handles there at that time?
  - A. I knew there was not a few trips before that.
  - Q. You knew there were not?
  - A. I knew there were not.
- Q. How did you know that there were on that day?
  - A. I looked on the day that the accident happened.
- Q. What called your attention to the accident—anybody speak to you about it?
  - A. No, that is a part of my duties, to investigate

(Deposition of William Paul Metzler.) those things and make an inspection; that is, if there are any injuries to a passenger, I make an inspection of the machinery, or whatever it is.

- Q. Was this investigation made the same day that Mr. Hutchins was hurt? A. The same day.
  - Q. Who did you say went with you?
- A. There was no one went with me when I inspected the showers, but I conferred with the captain and also with the house physician; he had a regular accident form that he filled out.
  - Q. Did you make any report to the captain?
- A. Just a verbal report; I did not talk to him about it.
  - Q. Did you make any written report to anybody?
- A. I did some time after, on the request of the claims agent, Mr. Relf; I believe he sent me a letter and I answered it.
- Q. What shower did you go to examine on the 18th of February, 1916?
- A. I examined them on the C deck, and the B deck; I went over all the showers.
  - Q. How many showers did you go to see?
- A. There were two on C deck and four on B deck. [582]
  - Q. How many showers are there on the boat?
- A. Well, there is a shower in each bachelor room, and four showers on B deck and two on C deck; I don't know how many bachelor rooms there are.
- Q. What made you go and examine the showers on B deck that day?
  - A. There were some complaints about the hot

(Deposition of William Paul Metzler.) water; they could not regulate them and I tried them.

Q. Have you anything to do with inspecting the plumbing; is that part of your duties?

A. Well, now—anything to the comfort of the passengers, looking over the ship, I usually recommend a remedy, or report if I see anything that is out of repair.

Q. Did you examine the showers on that day in the bachelor quarters?

A. No; I did not have any occasion to; I used one of the showers during that trip in a bachelor room.

Q. And you examined them on B deck. How many did you say on B deck you examined?

A. Four.

Q. How many on C deck? A. Two.

Q. Did you carefully observe whether or not there were handles on all of the shower-baths that you examined? A. I did.

Q. What made you make that observation?

A. I don't know; one thing I noticed, they did not have any soap-retainers; we did have but passengers had picked them up and carried them away, and this time I noticed we did not have any, and I made a particular note of it, that there were no soap-retainers.

Q. But you did take particular notice of the fact that there was a grab-iron on each shower?

A. I did.

Q. Nobody had said anything to you about the grab-handles, had they? A. No.

(Deposition of William Paul Metzler.)

Q. How long after the accident occurred before anybody said anything to you about these grab-handles?

A. It must have been some time that Mr. Relph spoke to me about it.

Q. Was he the first person that ever spoke to you about grab-irons?

A. He was in Portland, and I was riding the ship, and I made one [583] trip over to Portland, between the Honolulu trips, to get some clothing or something, and—he did not call me in—he happened to be talking about it and talking about the suit, that Mr. Hutchins had sued the company, something about it, and he said there were no rubber mats on the floor of the shower, or something of that kind.

- Q. Were there any rubber mats there? A. No.
- Q. In any of the showers? A. No.
- Q. What else did Mr. Relph say?
- A. That is about all that I can remember.
- Q. Did he ask you if the grab-handles were there?
- A. No; he understood there were grab-handles there.
  - Q. But did he ask you?
  - A. I don't remember as to that.
- Q. Did you tell him whether or not there were any at that time?
  - A. I may have, but I don't remember.
- Q. When was the first time that anybody spoke to you about the grab-handles, anybody in connection with the ship?
  - A. That is pretty hard to state; I might have

(Deposition of William Paul Metzler.) spoken about that myself, mentioned it myself.

Q. When was the first time that you remember talking with any officer of the ship or of the company about the grab-handles?

A. The captain and I talked it over that day, the day of the accident.

#### Redirect Examination.

Mr. CAREY.—Q. Do you recall how long before the accident the grab-handles had been put on these shower-baths?

A. How long before this trip?

Q. Yes.

A. I think we made two round trips before this trip of the accident—that is, they were put on two round-trips before, as I remember it.

(A recess was here taken until three P. M.)

(Testimony closed.) [584]

United States of America, State and Northern District of California, City and County of San Francisco,—ss.

I certify that, in pursuance of the stipulation hereunto annexed, on Saturday, October 21, 1916, and Monday, October 23, 1916, before me, Ira A. Campbell, designated as commissioner in the commission to take testimony, at my office in the Merchants' Exchange Building, 465 California Street, in the city and county of San Francisco, State of California, personally appeared Francis G. Lefebre, a witness called on behalf of libelant in the cause entitled in the caption hereof, and J. B. Morris and William Paul Metzler, witnesses called on behalf of claimant in the cause entitled in the caption hereof, and Grant H. Smith, Esq., appeared as proctor for the libelant, and Charles H. Carey, Esq., of the firm of Carey & Carey, appeared as proctor for the claimant, and the said witnesses being by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in said cause, deposed and said as appears by their depositions hereto annexed.

I further certify that said depositions were then and there taken down in shorthand notes by Edward W. Lehner, and thereafter reduced to typewriting; and I further certify that by stipulation of the proctors for the respective parties are reading over of the depositions to the witnesses and the signing thereof were expressly waived.

And I do further certify that I have retained the said depositions in my possession for the purpose of mailing the same with my own hand to the clerk of the United States District Court for the District and Territory of Hawaii, at Honolulu, Territory of Hawaii, the court for which the same were taken.

[585]

And I do further certify that I am not of counsel nor attorney for either of the parties in said depositions and caption named, nor in any way interested in the event of the cause named in the said caption.

IN WITNESS WHEREOF, I have hereunto set my hand at my office aforesaid this 28th day of December, 1916.

(S.) IRA A. CAMPBELL, Commissioner. [586] American Steamship "Great Northern" et al. 621

Filed Mar. 29, '17, at 1 o'clock P. M. A. E. Harris, Clerk. By Wm. L. Rosa, Deputy Clerk.

In the District Court of the United States in and for the Territory and District of Hawaii.

IN ADMIRALTY—LIBEL IN REM.

CLINTON JAMES HUTCHINS,

Libellant.

VS.

The American Steamship "GREAT NORTHERN" et al.,

Libellee,

and

A. AHMAN,

Master and Claimant.

Deposition of C. W. Wiley, for Claimant. [587] No. 147.

In the District Court of the United States in and for the Territory and District of Hawaii.

IN ADMIRALTY—LIBEL IN REM. CLINTON JAMES HUTCHINS,

Libellant,

VS.

The American Steamship "GREAT NORTHERN,"
Her Tackle, Apparel, Furniture, Boats and
Appurtenances, and Against All Persons

Having or Claiming to Have Any Interest Therein and Against All Persons Lawfully Intervening in Their Interests Therein,

Libellee,

and

A. AHMAN,

Master and Claimant.

Commission to Take Testimony of C. W. Wiley. [588]

In the District Court of the United States, in and for the Territory and District of Hawaii.

IN ADMIRALTY—LIBEL IN REM.

No. 147.

CLINTON JAMES HUTCHINS,

Libellant,

VS.

The American Steamship "GREAT NORTHERN,"
Her Tackle, Apparel, Furniture, Boats and
Appurtenances, and Against All Persons
Having or Claiming to Have Any Interest
Therein and Against All Persons Lawfully
Intervening in Their Interests Therein,

Libellee,

and

A. AHMAN,

Master and Claimant.

United States of America, Territory of Hawaii,-ss.

The President of the United States of America: To any United States Commissioner in the City of Seattle, State of Washington; to the Clerk of Any Court of Record in said City of Seattle: and/or to any Notary Public duly commissioned and sworn and residing in said City of Seattle; GREETING:

WHEREAS, in a certain suit now pending before the above-entitled United States District Court, in and for the Territory and District of Hawaii, wherein Clinton James Hutchins is libellant, the American Steamship "Great Northern," her tackle, etc., [589] is libellee, and A. Ahman is claimant of said vessel, all as above entitled, an order has been made and entered by the Court directing that a commission issue out of this court to take the deposition of C. W. Wiley as a witness on behalf of the claimant in said cause, and providing for the issuance of such commission to any United States Commissioner in the city of Seattle, State of Washington; to the clerk of any court of record in said city of Seattle, and/or to any notary public duly commissioned and sworn and residing in said city of Seattle, as commissioner to take the said deposition of said witness, as therein contemplated;

NOW, THEREFORE, we request that in furtherance of justice and in accordance with the terms hereinafter set forth, you, or any of you herein empowered as such Commissioner, will proceed, as Com-

missioner hereunder, with all convenient speed and promptitude to appoint a time and place for the taking of such deposition at the earliest practicable date, giving notice thereof to said witness, (whose place of business is represented by the claimant to be in the offices of the Seattle Construction and Drydock Company, in said city of Seattle,) and take the testimony of said witness under oath, in answer to the written interrogatories, direct and cross, which are attached to and made part of this commission, and thereupon reduce the same to writing, and cause the same to be read and signed by said witness; and upon the completion thereof, to sign and attach thereto your certificate of such taking thereof, and forthwith return the said deposition so certified, under sealed cover by mail addressed to the clerk of the United States District Court for the District and Territory of Hawaii, at Honolulu, Hawaii, together. with this commission and interrogatories and a statement of the costs incident to the taking of said deposition. [590]

WITNESS, the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the Supreme Court of the United States, the 24th day of February, Nineteen Hundred and Seventeen.

(S.) A. E. HARRIS,

Clerk, United States District Court, Territory of Hawaii. [591] In the District Court of the United States, in and for the Territory and District of Hawaii.

#### IN ADMIRALTY—LIBEL IN REM.

No. 147.

CLINTON JAMES HUTCHINS,

Libellant,

VS.

The American Steamship "GREAT NORTHERN," Her Tackle, etc.,

Libellee.

and

A. AHMAN,

Master and Claimant.

Direct Interrogatories Proposed on Behalf of the Claimant to be Propounded to the Witness, C. W. Wiley, and Attached to the Commission Herein to Take His Testimony.

Direct Interrogatory No. 1.

Please state your full name, age, and place of residence.

Direct Interrogatory No. 2.

Have you ever been in the employ of the Great Northern Pacific Steamship Company, at Portland, Oregon?

Direct Interrogatory No. 3.

If your answer to Direct Interrogatory No. 2 has been given in the affirmative, please state the period

(Deposition of C. W. Wiley.)

of time during which you were in the service of that company, and in what capacity? [592]

Direct Interrogatory No. 3.

Please state your duties as such employee.

Direct Interrogatory No. 5.

Do you know Dr. R. J. McAdory?

Direct Interrogatory No. 6.

Was he in the employ of the Great Northern Pacific Steamship Company during the month of February, 1916?

Direct Interrogatory No. 7.

If your answer to Direct Interrogatory No. 6 has been given in the affirmative, please state further in what capacity he was so employed, and where.

Direct Interrogatory No. 8.

When was he so engaged and how long did he continue in such employment?

Direct Interrogatory No. 9.

Who, on behalf of the Steamship Company, engaged him for that work?

Direct Interrogatory No. 10.

Do you know of your own knowledge whether or not upon his engagement in that capacity any inquiry or investigation was made concerning his qualifications and competency as a physician and surgeon? (Answer yes or no.)

Direct Interrogatory No. 11.

If your answer to Direct Interrogatory No. 10 has been given in the affirmative, please state by whom such inquiry was made. [593]
Direct Interrogatory No. 12.

(Deposition of C. W. Wiley.)

If your answer to Direct Interrogatory No. 10 has been given in the affirmative, please state further and in detail what inquiry was so made, and what information was obtained therefrom.

Direct Interrogatory No. 13.

If you have testified that such an inquiry was made by yourself, please state whether or not, in consequence thereof, any matter or thing came to your knowledge or attention in any manner reflecting upon the qualifications or competency of Dr. Mc-Adory as such physician or surgeon. If so, what? Direct Interrogatory No. 14.

Please state whether or not, in consequence of such inquiry or in any other way any matter or thing came to your knowledge or attention which raised any doubt in your mind as to his qualifications or competency as such physician or surgeon? If so, what?

Direct Interrogatory No. 15.

Please state what was your own actual belief, at the time, as to the qualifications and competency of Dr. McAdory as a physician and surgeon.

Direct Interrogatory No. 16.

Did you then entertain any doubt or question in your mind as to his qualifications or competency as a physician or surgeon?

Direct Interrogatory No. 17.

Since the engagement of Dr. McAdory as such physician and surgeon (if he was so engaged) for the Steamship "Great Northern," and during his service in that capacity, has any matter or thing come (Deposition of C. W. Wiley.)

to your knowledge or attention which has at any time raised any doubt or question in your mind as to the qualifications or [594] competency of Dr. McAdory as such physician or surgeon? Direct Interrogatory No. 18.

Do you know of any complaint or objection made by anyone against Dr. McAdory as to his qualifications or competency or performance of his professional duty as a physician or surgeon prior to the complaint made against him by Clinton James Hutchins, the libellant in this case, as to his alleged neglect or incompetency? If so, please state the same.

Direct Interrogatory No. 19.

Do you know of any other matter or thing touching any of the matters under inquiry in the foregoing interrogatories which will more fully state or explain the same? If so, please state them. The foregoing direct interrogatories are submitted by

# (S.) SMITH, WARREN & SUTTON,

Proctors for Claimant.

Received a copy of the foregoing direct interrogatories this 23d day of February, 1917.

### (S.) GEO. A. DAVIS,

Proctor for Libellant.

The foregoing direct interrogatories are hereby approved and allowed.

(S.) HORACE W. VAUGHAN,
Judge of the United States District Court for the
District and Territory of Hawaii. [595]

In the District Court of the United States, in and for the District and Territory of Hawaii.

#### IN ADMIRALTY—LIBEL IN REM.

No. 147.

CLINTON JAMES HUTCHINS,

Libellant.

VS.

The American Steamship "GREAT NORTH-ERN," Her Tackle, etc.,

Libellee,

and

A. AHMAN,

Master and Claimant.

Cross-Interrogatories Proposed on Behalf of the Libellant to be Propounded to the Witness C. W. Wiley, and Attached to the Commission Herein to Take His Testimony.

Cross-Interrogatory No. 1.

Do you know of your own knowledge what institutions of learning, Dr. R. J. McAdory attended? Cross-Interrogatory No. 2.

State whether or not at the time Dr. R. J. Mc-Adory was employed by the Great Northern Pacific Steamship Company you made any inquiry as to what institutions of learning said Doctor had attended, and the length of his attendance at the same. Cross-Interrogatory No. 4.

If your answer to cross-interrogatory Number 2

has been in the affirmative please name the institutions of learning attended by Dr. R. J. McAdory, together with the period of attendance at each.

Cross-Interrogatory No. 3.

If your answer to cross-interrogatory number 2 has been in the affirmative please state what degrees, if any, Dr. R. J. McAdory received from any institutions of learning he attended. [596] Cross-Interrogatory No. 5.

State, if you can, the nature and extent of the practical experience of Dr. R. J. McAdory as a physician and surgeon prior to his employment by the Great Northern Pacific Steamship Company.

Cross-Interrogatory No. 6.

Has Dr. R. J. McAdory a license to practice medicine under the laws of any State of the United States of America, and if so, did he have such license at the time of his employment by the Great Northern Pacific Steamship Company?

Cross-Interrogatory No. 7.

Is it not a fact that at the time of his employment by the Great Northern Pacific Steamship Company Dr. R. J. McAdory was a person of little or no practical experience as a practicing physician and surgeon?

Cross-interrogatory No. 8.

Is it not a fact that at the time of his employment by the Great Northern Pacific Steamship Company Dr. R. J. McAdory was only a student of medicine and a person with little or no practical experience in the practice of his profession?

Cross-Interrogatory No. 9.

What salary or reward was offered to Dr. R. J. McAdory in order to secure his services for and on behalf of the Great Northern Pacific Steamship Company, if any?

Cross-Interrogatory No. 10.

Is it not a fact that Dr. R. J.

(S.) H. W. Y. McAdory has failed to make a professional success of the practice of his profession up to the time of his employment by the Great Northern Pacific Steamship Company and was at that time in need of funds? [597]

The foregoing cross-interrogatories are submitted by

> THOMPSON, MILVERTON & CATH-CART and

(S.) GEO. A. DAVIS,

Proctors for Libellant.

Received a copy of the foregoing cross-interrogatories this 24th day of February, A. D. 1917.

(S.) SMITH, WARREN & SUTTON,

Proctors for Claimant.

The foregoing cross-interrogatories are hereby approved and allowed.

(S.) HORACE W. VAUGHAN,

Judge of the District Court of the United States in and for the District and Territory of Hawaii.

[598]

In the District Court of the United States in and for the Territory and District of Hawaii.

#### IN ADMIRALTY—LIBEL IN REM.

No. 147.

CLINTON JAMES HUTCHINS,

Libellant,

VS.

The American Steamship "GREAT NORTHERN,"
Her Tackle, Apparel, Furniture, Boats and
Appurtenances and Against All Persons Having or Claiming to have an Interest Therein
and Against All Persons Lawfully Intervening in Their Interests Therein,

Libellee,

and

A. AHMAN,

Master and Claimant.

### Deposition of C. W. Wiley.

BE IT REMEMBERED that, pursuant to the commission hereto attached, and on this 6th day of March, A. D. 1917, at the hour of four o'clock P. M. on said day, at the offices of the Seattle Construction & Dry Dock Company in the city of Seattle, County of King, State of Washington, U. S. A., before me, N. W. Bolster, a Notary Public in and for said state, duly commissioned to administer oaths, etc., personally appeared C. W. Wiley, the witness named in said commission, and said witness being

by me first duly sworn, I did then and there propound to him the direct and cross-interrogatories attached to said commission, and he made answer thereto as follows: [599]

#### DIRECT INTERROGATORIES.

Direct Interrogatory No. 1.

Please state your full name, age and place of residence.

Answering direct interrogatory No. 1, the witness saith:

Clarence Webster Wiley, age 47, and place of residence, Seattle.

Direct Interrogatory No. 2.

Have you ever been in the employ of the Great Northern Pacific Steamship Company, at Portland, Oregon?

Answering direct interrogatory No. 2, the witness saith:

Yes, sir.

Direct Interrogatory No. 3.

If your answer to Direct Interrogatory No. 2 has been given in the affirmative, please state the period of time during which you were in the service of that company, and in what capacity.

Answering Direct Interrogatory No. 3, the witness saith:

From July 1st, 1915, until August 1st, 1916, as marine superintendent.

Direct Interrogatory No. 4.

Please state your duties as such employee.

Answering Direct Interrogatory No. 4, the witness saith:

As marine superintendent I was in charge of the hiring and discharging of all the men connected with the actual operation of the steamships "Great Northern" and "Northern [600] Pacific."

Direct Interrogatory No. 5.

Do you know Dr. R. J. McAdory?

Answering Direct Interrogatory No. 5, the witness saith:

Yes, sir.

Direct Interrogatory No. 6.

Was he in the employ of the Great Northern Pacific Steamship Company during the month of February, 1916?

Answering Direct Interrogatory No. 6, the witness saith:

Yes, sir.

Direct Interrogatory No. 7.

If your answer to Direct Interrogatory No. 6 has been given in the affirmative, please state further in what capacity he was so employed, and where?

Answering Direct Interrogatory No. 7, the witness saith:

As doctor on board the Steamship "Great Northern."

Direct Interrogatory No. 8.

When was he so engaged and how long did he continue in such employment?

Answering Direct Interrogatory No. 8, the witness saith:

He was engaged in October, 1915, and continued during the entire Honolulu season and until the ship was taken off the run, which I think was in the latter part of April or the first of May, 1916.

Direct Interrogatory No. 9.

Who, on behalf of the Steamship Company, engaged him [601] for that work?

Answering Direct Interrogatory No. 9, the witness saith:

I did.

Direct Interrogatory No. 10.

Do you know of your own knowledge whether or not upon his engagement in that capacity any inquiry or investigation was made concerning his qualifications and competency as a physician and surgeon? (Answer yes or no.)

Answering Direct Interrogatory No. 10, the witness saith:

Yes, sir.

Direct Interrogatory No. 11.

If your answer to Direct Interrogatory No. 10 has been given in the affirmative, please state by whom such inquiry was made?

Answering Direct Interrogatory No. 11, the witness saith:

By myself.

Direct Interrogatory No. 12.

If your answer to Direct Interrogatory No. 10 has been given in the affirmative, please state further and in detail what inquiry was so made, and what information was obtained therefrom.

Answering Direct Interrogatory No. 12, the witness saith:

Dr. R. J. McAdory made a written application to me for the position, stating what ships he had been He mentioned the Toyo Kaisha Company, commonly [602] called the T. K. K. Company; also presented letters from the Palace Hotel and from the Medical Society of California and from Captain Anderson of the S. S. "Honolulu." Personally I was very well acquainted with C. W. Cook, the Pacific Coast manager of the American-Hawaiian Steamship Company, the owners of the S. S. "Honolulu," and I personally went to Mr. Cook's office and asked him about the record and services of Dr. Mc-Adory while in their employ on the S. S. "Honolulu," and he gave me a very good recommendation of him, stating that his services had been entirely satisfactory. Mr. Cook has been connected with the American-Hawaiian Steamship Company as their Pacific Coast representative for a period of practically ten years to my knowledge. Mr. Black of the Bank of California in San Francisco, also came to me recommending Dr. McAdory, stating that he, Mr. Black, had been a passenger on the S. S. "Honolulu" on a trip from San Francisco to New York, and that he could recommend Dr. McAdory very highly as a ship's surgeon. He stated that Dr. McAdory had attended to himself and his folks and that he felt that the doctor was a very reliable and competent man. Both of these gentlemen being personal friends of mine, I took their recommendations to a

much greater degree than one ordinarily accepts the usual recommendation. I also asked Dr. McAdory if he had a certificate permitting him to practice in California, or a license for California, and he answered in the affirmative.

I think the application referred to in this answer is in the files of the marine superintendent's office [603] at Pier No. 7, San Francisco, California. Direct Interrogatory No. 13.

If you have testified that such an inquiry was made by yourself, please state whether or not, in consequence thereof, any matter or thing came to your knowledge or attention in any manner reflecting upon the qualifications or competency of Dr. Mc-Adory as such physician or surgeon. If so, what? Answering Direct Interrogatory No. 13, the witness saith:

No matter or thing ever came to my knowledge or attention in any manner reflecting upon the qualifications or competency of Dr. McAdory as physician or surgeon.

Direct Interrogatory No. 14.

Please state whether or not, in consequence of such inquiry or in any other way any matter or thing came to your knowledge or attention which raised any doubt in your mind as to his qualifications or competency as such physician or surgeon. If so, what?

Answering Direct Interrogatory No. 14, the witness saith:

I have answered this question already in my an-

swer to the last preceding interrogatory.

Direct Interrogatory No. 15.

Please state what was your own actual belief, at the time, as to the qualifications and competency of Dr. McAdory as a physician and surgeon.

Answering Direct Interrogatory No. 15, the witness saith:

I considered him well qualified and fully competent to [604] serve as physician in the position mentioned.

Direct Interrogatory No. 16.

Did you then entertain any doubt or question in your mind as to his qualifications or competency as a physician or surgeon?

Answering Direct Interrogatory No. 16, the witness saith:

No. sir.

Direct Interrogatory No. 17.

Since the engagement of Dr. McAdory as such physician and surgeon (if he was so engaged) for the steamship "Great Northern," and during his service in that capacity, has any matter or thing come to your knowledge or attention which has at any time raised any doubt or question in your mind as to the qualifications or competency of Dr. McAdory as such physician or surgeon?

Answering Direct Interrogatory No. 17, the witness saith:

No, sir. As far as the Great Northern Steamship Company is concerned and my opinion as marine superintendent, his services were entirely satisfactory.

Direct Interrogatory No. 18.

Do you know of any complaint or objection made by anyone against Dr. McAdory as to his qualifications or competency or performance of his professional duty as a physician or surgeon prior to the complaint made against him by Clinton James Hutchins, the libellant in this case, as to his alleged neglect or incompetency? If so, please state the same. [605]

Answering Direct Interrogatory No. 18, the witness saith:

I never had any complaint during the season regarding the doctor. The complaint of Clinton James Hutchins, the libellant here, did not come to my knowledge during that season, and has only just come to my knowledge now.

Direct Interrogatory No. 19.

Do you know of any other matter or thing touching any of the matters under inquiry in the foregoing interrogatories which will more fully state or explain the same? If so, please state them.

Answering Direct Interrogatory No. 19, the witness saith:

No, sir. I do not know of any other matter.

#### CROSS-INTERROGATORIES.

Cross-Interrogatory No. 1.

Do you know of your own knowledge what institutions of learning Dr. R. J. McAdory attended?

Answering Cross-Interrogatory No. 1, the witness saith:

No, sir, I do not at this time.

Cross-Interrogatory No. 2.

State whether or not at the time Dr. R. J. Mc-Adory was employed by the Great Northern Pacific Steamship Company you made any inquiry as to what institutions of learning said Doctor had attended, and the length of his attendance at the same. [606]

Answering Cross-Interrogatory No. 2, the witness saith:

I do not remember making any; his application may have stated that information, but I do not remember.

Cross-Interrogatory No. 3.

If your answer to Cross-Interrogatory No. 2 has been in the affirmative, please name the institutions of learning attended by Dr. R. J. McAdory, together with the period of attendance at each.

Answering Cross-Interrogatory No. 3, the witness saith:

I have already answered this interrogatory in my answer to the last preceding interrogatory, which was in the negative.

Cross-Interrogatory No. 4.

If your answer to cross-interrogatory No. 2 has been in the affirmative, please state what degrees, if any, Dr. R. J. McAdory received from any institutions of learning he attended.

Answering Cross-Interrogatory No. 4, the witness saith:

I have answered this in my answer to the Cross-Interrogatory No. 2.

Cross-Interrogatory No. 5.

State, if you can, the nature and extent of the practical experience of Dr. R. J. McAdory as a physician and surgeon prior to his employment by the Great Northern Pacific Steamship Company?

Answering Cross-Interrogatory No. 5, the witness saith:

I would say his employment by the American-Hawaiian [607] Steamship Company on board the S. S. "Honolulu" and his employment by the Toyo Kisen Kaisha Steamship Company was what I based my judgment on in hiring him for the position on the S. S. "Great Northern."

Cross-Interrogatory No. 6.

Has Dr. R. J. McAdory a license to practice medicine under the laws of any state of the United States of America, and if so, did he have such license at the time of his employment by the Great Northern Pacific Steamship Company?

Answering Cross-Interrogatory No. 6, the witness saith:

My understanding was that Dr. McAdory had a license to practice medicine under the laws of the State of California.

Cross-Interrogatory No. 7.

Is it not a fact that at the time of his employment by the Great Northern Pacific Steamship Company Dr. R. J. McAdory was a person of little or no practical experience as a practicing physician and surgeon?

Answering Cross-Interrogatory No. 7, the witness saith:

Not to my knowledge.

Cross-Interrogatory No. 8.

Is it not a fact that at the time of his employment by the Great Northern Pacific Steamship Company Dr. R. J. McAdory was only a student of medicine and a person with little or no practical experience in the practice of his profession?

Answering Cross-Interrogatory No. 8, the witness saith: [608]

Not to my knowledge, but on the contrary I was informed that his services with the other companies mentioned had been entirely satisfactory.

Cross-Interrogatory No. 9.

What salary or reward was offered to Dr. R. J. McAdory in order to secure his services for and on behalf of the Great Northern Pacific Steamship Company, if any?

Answering Cross-Interrogatory No. 9, the witness saith:

He was signed on the ship's articles at seventy-five dollars per month, and at the end of the season I gave him a bonus, which, according to the best of my recollection, would make his salary equal to about one hundred dollars per month for his services.

Cross-Interrogatory No. 10.

Is it not a fact that Dr. R. J. McAdory had failed to make a professional success of the practice of his profession up to the time of his employment by the Great Northern Pacific Steamship Company and was at that time in need of funds?

Answering Cross-Interrogatory No. 10, the witness saith:

It is not a fact that Dr. McAdory had failed to make a professional success, so far as I knew. At the time of his employment he did not appear to be in need of funds.

(S.) C. W. WILEY. [609]

State of Washington, County of King,—ss.

This is to certify that the foregoing deposition of the witness C. W. Wiley was taken before me pursuant to the commission hereto annexed, on the 6th day of March, A. D. 1917, at the offices of the Seattle Construction & Dry Dock Company, in the city of Seattle, County of King, State of Washington; that said witness, before testifying, was by me first duly sworn to testify the truth, the whole truth and nothing but the truth; that the direct and cross-interrogatories attached to said commission to be propounded to said witness, were by me propounded to said witness and the answers of said witness to said interrogatories were by me written down and when the same was completed said deposition was read over by the said witness and being by him ap-

(S.) N. W. B. proved was then and there signed in my presence, by said witness.

IN WITNESS WHEREOF I have hereunto set my hand and affixed my notarial seal this 6th day of March, A. D. 1917.

# (S.) N. W. BOLSTER,

Notary Public in and for the State of Washington, Residing at Seattle.

Commissioner's fees, \$17.50.

Paid by libellee and claimant.

(S) N. W. BOLSTER, Commissioner. [610]

# Proceedings at Decision and Notice of Appeal by Libellant to Ninth Circuit Court of Appeals.

From the Minutes of the United States District Court, Vol. 10, page 409, Tuesday, April 3, 1917.

(Title of Court and Cause.)

On this day came Mr. Charles S. Davis on behalf of Mr. George A. Davis, proctors for the libellant herein, and also came Mr. L. J. Warren, of the firm of Smith, Warren & Whitney, proctors for the above libellee, and this cause was called for decision. Thereupon the Court announced its decision in favor of the libellee and to which decision Mr. Davis entered an exception and gave notice of appeal to the Ninth Circuit Court of Appeals. Thereafter it was by the Court ordered that said decision be filed. [611]

Filed April 3, 1917, at —— o'clock and —— minutes — M. A. E. Harris, Clerk. By Wm. L. Rosa, Deputy Clerk.

In the United States District Court for the Territory of Hawaii.

#### IN ADMIRALTY—IN REM.

CLINTON JAMES HUTCHINS.

Libellant.

VS.

The American Steamship "GREAT NORTHERN." etc..

Libellee.

## Opinion of the Court on the Issues of Law and Fact in the Case.

The libellant was a first-class passenger on board the steamship "Great Northern," leaving San Francisco on or about the 14th day of February, 1916, for a voyage to Honolulu and return. He alleges in his libel that he suffered injuries while he was such passenger, caused by the negligence of the vessel; and he seeks to recover damages on account thereof. The issues will be stated as they are made by the libel and the answer. The libel alleges:

"That it then and there became and was the duty due and owing from the said steamship 'Great Northern,' its owners and officers, to provide this libellant with a safe passage, as above set forth, and to provide on said steamship 'Great Northern' safe and proper appliances and equipment so that libellant could make said passage and voyage in safety and without harm or injury to himself; that in consideration of

the money paid for such first-class passage, and by reason of the agreement under which the said libellant embarked as passenger on board said steamship 'Great Northern,' the said libellant was to be furnished with a safe and proper place for [612] bathing, and it then and there became and was the duty of the libellee, its owners and officers, to furnish and provide for the use of the libellant a safe and proper bath-room, with safe and proper equipment and appliances for the bath.

That in violation of the agreements and duties above set forth, and with a reckless disregard of the rights of this libellant, and negligently and carelessly the said bath-rooms on the said steamship 'Great Northern' were so negligently constructed that they were dangerous and were unsuitable for the purpose of bathing; that more especially the rooms fitted up as and for shower-baths on the said steamship 'Great Northern' were carelessly and negligently constructed so that the same were dangerous and unsuitable for the purposes of taking a showerbath therein; that the base or bottom of said shower-baths was a porcelain bowl about two feet or so square, with sides from three to four inches high, with a slight depression in the center, and a slope thereto from all directions to the drain in the center of the bowl; that the sides of said shower-baths were constructed of marble slabs, with service pipes for both hot and cold water running up the side of one of said mar-

ble slabs; that in order to reach and enter the bath, it was necessary to step over the top of the rim of the bowl; that by reason of said construction, the bowl was slippery and difficult to stand upon and in; that there was no provision made by means of rails or otherwise for grasping or holding on in case of slipping, nor was there any provision made by rubber mats, or otherwise, to prevent slipping and falling in said baths; that at all times, and especially when wet the said bowls became slippery and dangerous, and the equipment and lack of equipment, as aforesaid, were such as to cause a person entering therein to fall; that the construction and equipment and lack of equipment, as above set forth, made and rendered the said shower-baths unsafe and dangerous, and the construction and equipment, and lack of equipment, as above set forth, was negligent and careless as was to said libellee, its owners and officers, then and there well known. But that notwithstanding such negligent and faulty construction, equipment and lack of equipment, and notwithstanding the dangerous character thereof, the said baths were held out and made known to all passengers, and more especially to this libellant as proper and safe baths, both in construction and equipment.

That on the morning of the 18th day of February, 1916, while on board the libellee, the Steamship 'Great Northern,' on the voyage from San Francisco to Honolulu, as aforesaid, and between the ports of San Pedro and Hilo,

in the Territory and District of Hawaii, this libellant relying on the representation and agreement aforesaid that the said shower-bath rooms were safe and usable, entered one of the said shower-baths for the purpose of taking a shower-bath therein; that for such purpose, he had been duly called by the bath steward in charge of said shower-bath and just as this libellant entered the shower-bath room, the said steward turned the water on therein; that without any fault or negligence on the part of this libellant, as he stepped up over the rim of the porcelain bowl aforesaid, and as soon as his feet were on the porcelain bowl, by reason of the slipperiness of the [613] same, and by reason of the faulty construction, as above set forth, and because of the negligent and careless construction thereof, this libellant slipped and fell; that by reason of the faulty, negligent and improper construction thereof, there was nothing in said bathroom by which the libellant could save himself from falling by grasping or taking hold of any rail or other holding place; that this libellant was thrown heavily on his left side, and his left hand struck in the bowl of the bath opposite to the one he had entered, and the construction of which was of the same kind, and his hand slipping on the slippery porcelain bowl, and the weight of his body coming on his arm, the left shoulder joint of libellant was fractured and this libellant sustained severe injuries and bruises and a severe shock to his nervous sysThe claimant, the Master, answering for his vessel says:

"The claimant admits the allegations of Paragraph 2 of said libel; and, with respect thereto, further alleges that the said steamship 'Great Northern,' its owners and officers, did in fact accordingly furnish and provide the libellant with all suitable, requisite, safe, and proper appliances, conditions, facilities, and service for a safe passage on said vessel without harm or injury to himself, including a safe and proper place for bathing and safe and proper bathrooms, equipment and appliances of the bath.

Answering the allegations of Paragraph 3 of said libel, this claimant denies that the bath-rooms or any of them on said vessel were negligently constructed or were dangerous or unsuitable for the purposes of bathing; and more especially denies that the rooms or any of them fitted up as and for shower-baths on said vessel were carelessly or negligently constructed or were dangerous or unsuitable for the purpose of taking a shower-bath therein; and further denies that the construction thereof was faulty, improper, unsafe or dangerous.

And this claimant further denies that said floor bowls were in any respect more slippery to

stand upon or in than any porcelain floor or other clean and sanitary bath fixture; and denies that there was no provision by means of rails or otherwise for grasping or holding on in case of slipping.

Answering the allegations of Paragraph 4 of said libel, this claimant has no knowledge except by information from others, but basing his answer thereto upon his information and belief and, while admitting that the libellant, while using or attempting to use the shower-room or compartment on the port side in the bath-room on 'C' deck of said vessel, lost his balance and fell and sustained some bruises or injury, the exact nature and extent of which are to this claimant unknown, yet this claimant denies that said accident occurred or injuries were sustained [614] by reason of any negligent, careless or faulty construction of the said bath or shower room or accommodations, but were in fact the result of failure of the libellant to exercise common care in view of the motion of said vessel while so travelling on the high seas."

Further answering said libel this claimant alleges as follows:

"(1) That the steamship 'Great Northern,' whereon the libellant engaged and had passage from San Francisco to Honolulu, upon the voyage described in the libel herein, was at all of the times mentioned in said libel provided with numerous bath-rooms, some fitted with procelain tubs and others with showers, and all of the

latest, modern, and most commodious and practical design and equipment.

- (2) That it was at all times optional with the libellant whether or not he would use a shower-bath, or a tub bath, or any bath at all, on said voyage.
- (3) That at all of the times mentioned in said libel the shower-bath referred to in the said libel as that in which or in connection with which the libellant is alleged to have been injured was and is a room approximately thirty inches square, having its walls made of upright marble slabs, open in front and having a pipe overhead and across the front as a curtain rod or support carrying sliding rings for front curtain; that the floor thereof was formed by a porcelain basin of the most approved and modern material and type, measuring approximately twenty-four inches square, practically level having no more slope than was and is necessary for proper drainage, and having sides about six inches above the level of the outside floor. That the said basin or floor was not difficult to stand in or upon, nor was the said bathroom or its equipment in any respect unsafe or dangerous, or carelessly or negligently constructed, or likely in any manner to cause a person using the same to slip or fall.
- (4) That the said shower-bath room was and is provided with a metal handle plainly visible and firmly fixed on the back wall at a convenient height for any person to reach, for instant use

if desired; besides which there were a number of other convenient and immediately accessible means of support in and about the said shower bathroom; all of which were plainly visible and conveniently available and useful for the purpose of being taken or used by any person using the said shower bathroom should occasion require or such use thereof seem desirable.

(5) That said floor or basin was made of porcelain which is the usual and approved material for such purpose, to insure cleanliness, and was clean and no more slippery than any

other porcelain bath. [615]

(6) That the whole method of construction, the form, the materials used, and the facilities provided and available for holding, and the condition of said bath as to being slippery or otherwise, were all plainly visible to the libellant.

(7) That the said shower-bath room was well

lighted by electric light.

(8) That the placing of rubber mats or other floor covering in the basin or floor of the shower-bath rooms was and is not necessary, efficient or of value in rendering the floor any more safe to stand in or upon consistently with proper cleanliness and practical use thereof; and that the said bath-room was proper and safe both in construction and equipment.

(9) That said accident occurred while the said vessel was traveling on the high seas, and if the libellant sustained any injury to himself by reason of having slipped or fallen while using

the said bath-room such injury was occasioned solely and only by the carelessness and negligence of the libellant in his use thereof and in not taking reasonable care or precaution to guard against the same under the conditions and motion of the said vessel at sea; and that the same occurred without any fault or negligence whatsoever on the part of the libellee, or its owners, or its officers or servants on board said vessel.

(10)That said alleged injury was not in any manner caused or contributed to by the style or method of construction or equipment of the said shower-bath room."

The issues made by these allegations and denials and counter allegations contained in the libel and the answer, may be shortly stated:

- (1) Did the vessel use that high degree of care, required of it, to make it safe for libellant to take a shower-bath in the place it provided for that purpose?
- Did libellant fall and receive his injuries on account of the failure, if any, of the vessel to make adequate provision to prevent him from falling or to enable him to prevent himself from falling?
  - (3) What caused libellant to fall?

Let us examine the evidence and see what answer should be made to these questions from the evidence. [616]

The libellant testified substantially as he alleged in the libel. The allegations of the libel make a substantial statement of his testimony. He testified

among other things, that he had one foot in the shower-bath room and started to put the other foot in, and as he put it on the bottom of the basin in which he was to stand to take the bath, both feet slipped from under him and he fell; that there was nothing for him to catch hold of to prevent falling; that there was no handle on the wall nor anything else about the place for him to catch to prevent falling; and that there was no mat or anything else on the bottom of the basin to prevent him from slipping, and that he slipped and fell on account of the condition of the bottom of the basin, being unprovided with anything to prevent slipping, and the condition of the place, being unprovided with anything for him to hold on to or to catch to prevent falling.

The evidence fails to show any neglect to take precautions to make the shower-bath room or place safe unless it can be said that there was no handle on the wall of the compartment and that this was negligence, or that the failure to provide a mat or other means on the bottom of the basin to prevent slipping, considering all circumstances and other provisions for safety, was negligence.

Was the handhold on the wall of the compartment? There is a sharp conflict in the evidence on that question. The libellant swears positively that there was no handhold there on February 18th, at the time he was injured by falling while entering the compartment. His testimony is corroborated on this point by the deposition of Francis Lefebre, one of the stewards on the vessel and the testimony of H. E. Westcott. [617]

There is also the testimony of one or two other witnesses, to the effect that the handhold was not there, or that they did not see any handhold there. But the three mentioned are very positive that it was not there.

Against this there is the positive, affirmative testimony of A. Ahman, the Captain, and J. B. Morris, Chief Engineer, each of whom swears positively that the handhold was there. There is also the testimony of Charles Wall, Chief Officer, H. K. Relf, General Claims Agent, and Special Agent Metzler, and Mc-Adory, the surgeon, and C. S. Mills, the Chief Steward, each of whom swears positively that the handhold was there at the time. W. J. Tomlin, the ship fitter, testified by deposition that he put the handles on the bath compartments—that he, himself, did the work—that he did it on the 24th and 25th days of January, 1916; he had been employed to do it by Muir & Symon, and that he had kept a record of the time he did it and turned in his time cards to his employers, made out and signed by himself, showing the dates, which enabled him to be certain about the dates, and they are attached as exhibits to this deposition and corroborate his statements.

J. B. Switser, foreman for Muir & Symon, swears positively that he ordered the handles to be made at the foundry and instructed Mr. Tomlin to drill the holes in the walls of the compartments for them and have everything ready to put them on, and that he superintended the work, and that the handles were put on the walls of the compartments during the month of January, and that he is positive that they

were put on prior to February 18th, the date when libellant was injured. [618]

Katie Schnieder, bookkeeper for Muir & Symon, kept the books in regard to the business transactions growing out of the order given Muir & Symon by the "Great Northern" to put the handles on the walls of the bath compartments and the doing of the work accordingly, and her deposition states facts which make it very certain that the handholds were put on prior to February 18th, the date when libellant was injured.

Samuel Symon, Manager of Muir & Symon, testified by deposition, and his testimony shows very conclusively that the handholds were put on as testified to by the other witnesses whose testimony has been referred to. The Chief Steward, C. S. Mills, testified and produced the original requisition for the work and the bill for the same approved by him before the sailing on January 25th, after he had examined the work and had found the handles on.

The libel was filed on April 4th, 1916, and the order was made to have photographs of the compartment in which the libellant was injured, made on the 1st of May, and they were taken the same day, and they show the handhold on the compartment.

Some passengers testifying by depositions do not remember whether the handhold was on the compartment at the time the libellant was injured or not. Others do remember and testify that the handhold was there.

Sam B. Stoy of San Francisco, Manager of the London & Lancashire Fire Insurance Company, and of the London & Lancashire Indemnity Company, was a passenger on the same voyage; he testified by deposition, and he swears positively that the handhold was on the wall of the shower-bath compartment into which libellant was about to enter at the time he fell and was injured. [619]

In order to find that the handhold was not there, it is necessary not only to refuse to believe the positive, affirmative testimony of several disinterested, reputable witnesses, swearing positively that it was there, but also to believe that the agents of the vessel have induced other disinterested witnesses, those who supplied the handles, and the workmen who put them on, and the bookkeeper who kept the accounts, to falsify and to make false records of the dates of business transactions for the purpose of making a defense in this case. The evidence that the handhold was there at the time, is overwhelming.

It is a well-known rule of law that affirmative statements are entitled to more weight than negative, even when the makers of the statements are equally creditable, equally disinterested and equally certain and positive that their statements are true. A witness may swear positively that a handhold was not on the wall of a compartment at a certain time and think his statement is true, and yet it may be untrue; he may not have observed the handhold; but when a witness swears positively that a handhold was on a compartment at a certain time, that he saw it and knows it was there, if his statement is untrue, no such explanation of it can be made.

The testimony of some of the witnesses who have

testified that there was no handhold or hand-grab or handle, by whatever name it be called, on the wall of the shower-bath room, may be explained upon the ground that the fact that the handle was there escaped their observation, or they are under erroneous impression as to when it was they made their observations. [620]

But, however that may be, I find from the evidence that there was a handhold on the wall of the bathroom, at the time the libellant was about to take a bath, when he fell and was injured.

There was no mat of any kind on the bottom of the basin in which it was necessary to stand in order to take a shower-bath, nothing but the bottom of the basin itself; and it is contended by libellant that something less slippery should have been provided and placed over the bottom of the basin, a rubber mat or a structure of some kind placed over the bottom so that one could enter and use the place without incurring the danger of slipping and falling; and that it was negligence to fail to make such provision for the safety of those using said place.

There is a sharp conflict in the evidence as to whether the placing of a mat or anything else over the bottom of the basin would have added anything towards making it less slippery, or rendering it less likely that one using the place to take a bath would fall on account of the bottom being slippery. It is contended for the vessel that a mat or anything else placed over the bottom of the basin would have been as likely to slip thereon as the bare foot of a person

taking a bath, and would have added nothing to the safety of the place.

Chief Steward Hackett, of the S. S. "Sierra," testified that the shower-bath rooms of that vessel are like those of the "Great Northern" in every respect; but that for several years provision has been made to make those of the "Sierra" safe by fitting a structure made of wood, a kind of lattice work, over the bottoms of the basins in such manner [621] as to prevent the structure itself from slipping; and that this provision makes the bath-rooms much safer.

Was the failure to provide anything of the same kind negligence on the part of the "Great Northern"?

If it be conceded that providing something of the same kind over the bottoms of the basins, would have made them safer as regards danger from the slipperiness of the bottoms, it does not necessarily follow the vessel was negligent in not so providing.

The question whether the failure to make such provision was negligence depends upon what other provisions for safety had been made. If the other provisions for safety were such that any person, exercising ordinary care and using the means provided, was in no danger in using the place, it was not negligence to fail to provide a mat or other covering for the bottom of the basin.

The master of the vessel, Captain Ahman, and the Chief Engineer, J. B. Morris, testified that said vessel and the "Northern Pacific," with bath-rooms in all respects the same, had before libellant's injury carried thousands of passengers; and this was the

first instance in which it had ever come to their knowledge that any one had ever been injured in taking a shower-bath, or made any complaint about the lack of provision for safety for taking one. According to this it would appear that they were safe even before the handles were put on.

In view of the fact that the evidence shows that all any one needed to do to avoid slipping or falling, and to be entirely safe in entering the bath-room and taking a bath, was [622] to hold to the curtain over the entrance, or to the rod above the curtain, or to the outer edge of the wall at the entrance, or to the handle on the rear wall which could easily be reached from outside, I conclude that all the care required by law to avoid the danger of slipping and falling in using said place was exercised, and that it was not negligence not to provide a mat or covering for the bottom of the basin; nor am I unmindful that it was the duty of the owners of the vessel to exercise for the safety of passengers the utmost care of which human foresight is capable; they were not required to do more, and had the right to assume that those using the place would exercise ordinary care for their own safety and make use of those means for safety which were provided.

There is a sharp conflict in the evidence as to whether the libellant's fall which caused his injury, was caused by slipping on the floor of the bath-room or by there being no handhold on the wall, even if it were conceded that there was no handhold there. There was an eye-witness to the accident, whose deposition, if true, shows that the libellant fell before he

ever entered the bath-room, before he put either foot on the floor of the basin, and that his fall was caused by the rolling of the vessel, libellant losing his balance when he started to step into basin, one foot on the floor of the compartment outside the bath-room, the other raised for the purpose of stepping in. Dr. Barney R. Simons, of Philadelphia, testified by deposition, taken September 28th, 1916, that he was a passenger on the vessel at the time libellant was injured, and that he witnessed the accident, "was the only one present and the only one who saw the accident," that he desired to take a shower-bath himself and went to the place [623] for that purpose, and libellant was there when he got there, that libellant was standing outside of the bath-room and occupied practically the entire passageway between the one he was about to enter and the one on the opposite side of the passageway, and he (witness) sat down on a stool near by and observed libellant until such time as he might get out of the passageway so he (the witness) could enter the opposite shower, that libellant stood with his left hand against the wall and with his right hand was feeling the temperature of the water; "the vessel about this moment lurched, at the same time Mr. Hutchins endeavored to step into the shower, his right foot forward, resting his weight on his left, when his left foot slipped from under him and he fell with his left shoulder upon the edge of the opposite shower."

I have carefully examined the deposition of this witness and I find no reason to refuse to believe his statements. He appears to be disinterested, intelli-

gent and in every respect worthy of credence, and I think it would be contrary to common sense and the dictates of right and justice to refuse to believe him and to accept as true the statements of the libellant, who is interested, however respectable and worthy, which are so flatly contradicted by him.

I therefore find that libellant did not slip on the bottom of basin, that he fell because he lost his balance on account of the vessel lurching when he was about to step into the bath-room, and that his fall was not caused by any negligence of the vessel or its owners or servants.

Proctors for libellant strenuously insist that the answer of the claimant admits that libellant fell in the bath-room and that the admissions in the answer obviate the evidence given by Dr. Simons. I have carefully read the answer and I find no such admission. [624]

In support of the contention that the answer does make such admission, one of the proctors for libellant, in a typewritten argument which he was permitted by the Court to file after the argument in the case had been concluded, culls out from the sentence quoted below from the answer, the words therein which I have underscored, omitting all the remainder of the sentence.

"Answering the allegations of paragraph 4 of the libel, this claimant has no knowledge except by information from others, but basing his answer thereto upon his information and belief, and, while admitting that the libellant, while using or attempting to use the shower room or

compartment on the port side of the bath-room on 'C' deck of said vessel, lost his balance and fell and sustained some bruises or injury, the exact nature and extent of which are to this claimant unknown, yet this claimant denies that said accident occurred or injuries were sustained by any negligent, careless or faulty construction of said bath or shower room or accommodations, but were in fact the result of the failure of libellant to exercise common care in view of the motion of said vessel while so traveling on the high seas."

It is hardly necessary to say that neither the whole of the sentence, nor the part underscored makes any admission that libellant slipped upon the bottom of the basin or that libellant ever got into the basin.

There is no admission in the answer that obviates the facts testified to by Dr. Simons, which prove that libellant did not slip upon the bottom of the basin, but that he lost his balance and fell on account of the motion of the vessel when he started to step into the shower room and before he ever placed either foot on the floor or basin thereof.

On February 16th, 1917, libellant filed the following amendment to the libel, viz.: [625]

AND THE SAID LIBELLANT further alleges and charges that it became and was the bounden duty of the said steamship 'Great Northern,' its owners and the masters thereof to employ and keep employed and have on board of said steamship on said voyage hereinbefore set out in this libel a skilful and competent phy-

sician and surgeon and it became and was the bounden duty of said steamship, its owners and the master thereof under the marine contract so entered into between the libellant and the said steamship, its owners and master thereof to employ and keep employed on board of said steamship a competent and skilful physician and surgeon to attend to this libellant and to exercise medical care and surgical skill in healing and endeavoring to heal and cure him of the injuries so sustained by him as aforesaid on board of said steamship on the said 18th day of February, A. D. 1916, and at all other times during said voyage; and it became and was the bounden duty of the said steamship, its owners and the master thereof to exercise the highest degree of care and to endeavor to and use skill, care and render the best possible surgical and medical attention towards this libellant after he sustained the injuries as aforesaid in order to heal and cure him of his injuries and to continue to exercise the highest degree of care and skill towards the libellant after he received the said injuries during the rest of the voyage and until the arrival of said steamship 'Great Northern' in the port of Honolulu; yet the said steamship, the master and its owners thereof not regarding their duty in that behalf and in violation of the marine contract so entered into as aforesaid and in violation of the duty and obligations arising under said marine contract, the said steamship, the master and owners thereof did not employ

and keep employed nor furnish this libellant with a competent physician but had an unskilful, incompetent physician on board said steamship who failed and neglected to give proper care and exercise proper medical skill and attention towards this libellant, which the said steamship, its owners and the master thereof well knew and neither the master nor the officers of said steamship nor said incompetent physician exercised proper care, skill and attention towards this libellant at any time during said voyage and after he had received the injuries so occasioned as aforesaid, the said incompetent physician so employed as aforesaid treated the injuries sustained by the libellant unskilfully, negligently and improperly and by reason of the incompetency of the said physician and surgeon so employed as aforesaid, the libellant suffered excruciating pain and torture after he sustained the said injuries as aforesaid and during the remainder of said voyage on said steamship by reason of the failure and neglect of the master and officers of said steamship towards him and because of the incompetency of said physician and surgeon so employed as aforesaid, the said physician and surgeon so employed as aforesaid did not make a proper examination of the broken shoulder-joint and injuries so sustained by this libellant nor did he use proper care and skill in attending to the same but treated it as a bruise and was guilty of gross negligence and the said steamship, the master and owners

thereof in violation of [626] said marine contract so entered into as aforesaid between this libellant, the said steamship and the owners and master thereof employed and kept employed said wholly incompetent physician during all of said voyage with full knowledge that said physician and surgeon was wholly incompetent and unskilful and said steamship, its owners and the master thereof failed and neglected to render such proper medical care and skill to this libellant as required by the terms of said marine contract so entered into as aforesaid and failed and neglected to call in the assistance and advice of other physicians and surgeons who were passengers on board of said steamship during said voyage and utterly failed and neglected to exercise the highest or any degree of care towards this libellant."

The claimant answered as follows, viz:

"This claimant denies that the surgeon on board the steamship 'Great Northern,' upon the voyage described in said libel and in said Paragraph 4a thereof, was incompetent, unskillful or negligent in his treatment and care of the Libellant; and denies that the said physician when engaged by the owners of said vessel was known to said owners or to the master thereof as being unskillful or incompetent; and denies that then or thereafter at any time up to the time of the injury of Libellant complained of the said owners or master knew of any incompetency of the said physician; and denies that

the said owner and/or master employed to keep the said physician employed, knowing or believing him to be incompetent or unskillful."

The injury not having been caused by any negligence of the vessel, or anyone for whose negligence it is liable, is it liable for such suffering and damages as were caused by the fact, if it be a fact, that that that vessel's surgeon failed to give proper surgical attention to libellant's injury?

Evidently the failure of the surgeon to do so did not cause the injury, and the evidence fails to show any injurious consequences of the failure of the surgeon to treat the injury as it should have been promptly treated, except the physical and mental suffering endured during the delay in recovery and delay in receiving treatment, for he did have proper surgical attention given to his injury on [627] arriving in Honolulu three days afterwards, and there is no evidence of any permanent injury caused by the delay in receiving treatment. He suffered a very serious, painful injury and still suffers to some extent therefrom; but the surgeon who treated him and who was a witness in his behalf testified that he has recovered almost entirely and neither he nor any other witness testifies to any injurious consequences of the fact that his injury was not properly treated until he arrived at Honolulu.

However that may be, is the vessel liable for such suffering as he endured and such damages as he sustained as were caused by the failure of the vessel's surgeon to properly treat his injury?

Regardless of the cause of his injury and of the

question of liability therefor, it was the duty of the vessel to exercise the care required by law to relieve the suffering of her injured passenger. But was it her duty to give proper surgical treatment to his injury, or to furnish a surgeon to do so? Is she liable for the neglect of the surgeon she had employed on board, being required thereto by section 5 of the Act of Congress of August 2, 1882 (U. S. Comp. Stats., vol. 7, p. 9822, sec. 8002) to treat the libellant's injury?

The evidence does not show that the surgeon did anything he should not have done, or that anything he did caused any injury or suffering. He simply administered codeine to alleviate libellant's suffering. He did not treat the injury at all, because, he says, he was not sure there was a fracture, and because, he says, the vessel would arrive in Honolulu in sufficient time to admit of deferring treatment until such arrival. That he should have at once properly treated the injury so as to permit a recovery to begin at once, is doubtless true. But he did not. Is the vessel liable for such damages as [628] resulted from his failure to do so?

Much stress has been laid upon the general duty of the carrier to provide for the safety, health and comfort of passengers, to which I heartily agree; but I cannot find any authority for holding that any rule of the law applied by Courts of Admiralty in such cases, or of the common law, requires carrier vessels to furnish an injured passenger with a surgeon to treat such an injury as that of the libellant. Does the act of Congress referred to require it? The part

of the section of the Act referred to, relied upon as imposing that duty, reads as follows, viz:

"And every steamship or other vessel carrying or bringing immigrants, passengers, or passengers other than cabin passengers, exceeding fifty in number, shall carry a duly qualified and competent surgeon or medical practitioner, who shall be rated as such in the ship's articles, and who shall be provided with surgical instruments, medical comforts, and medicines proper and necessary for diseases and accidents incident to sea voyages, and for the proper medical treatment of such passengers during the voyage, and with such articles of food and nourishment as may be proper and necessary for preserving the health of infants and young children; and the services of such surgeon or medical practitioner shall be promptly given in any case of sickness or disease, to any of the passengers or to any infant or young child of any such passengers, who may need his services." U.S. Comp. Stats., vol. 7, p. 8522, sec. 8002.

I do not find where the question whether this language makes a vessel liable to a passenger for such damages as he sustained on account of the failure or neglect of the surgeon to treat an injury to such passenger, has ever been before any court. In the case of Leubheim v. Netherland S. S. Co., 107 N. Y. 228, 13 N. E. 781, the plaintiff, a passenger, slipped upon the deck and injured her knee, the surgeon employed by the defendant took charge of her and operated

upon the injured part, and the action was brought to recover damages alleged to have been caused [629] by the alleged improper and negligent treatment of the surgeon. No negligence on the part of the defendant in selecting the surgeon was shown, and the action was dismissed by the trial judge, and his judgment was affirmed by the Court of Appeals.

The Court said in an opinion concurred in by all the justices:

"It is not necessary in this case to determine whether at the date of the accident to the plaintiff, the steamship company owed a duty to its passengers to provide a surgeon for their care and safety in the emergency of sickness or accidents, or whether, having voluntarily assumed that duty, its position became identical with that of a carrier bound by law to furnish such an officer, since either proposition may be granted without involving error in the judgment rendered.

If by law or by choice the defendant was bound to provide a surgeon for its ship, its duty to the passenger was to select a reasonably competent man for that office, and it is liable only for neglect of that duty. It is responsible solely for its own negligence and not that of the surgeon employed. In performing such duty it is bound only to the exercise of reasonable care and diligence, and it is not compelled to select and employ the highest skill and longest experience."

It does not appear, however, that the Act of August 2, 1882, was construed or alluded to by the Court in that case. In fact it appears that the injury was caused prior to the passage of that Act.

In the case of O'Brien v. Cunard S. S. Co., 154 Mass. 272, 28 N. E. 266, the Supreme Court of Massachusetts, in an action for damages, alleged to have been caused by alleged negligence of the ship's surgeon in vaccinating the plaintiff, a passenger on one of the vessels of the defendant, said:

"Whether there was any evidence of negligence of the surgeon we need not inquire, for we are of opinion that the defendant is not liable for his want of care in performing surgical operations. The only ground on which it is argued that the defendant is liable for his negligence is that he is a servant engaged in the defendant's business, and subject to its control. We think this argument is founded on a mistaken construction of the duty imposed on the defendant by law." [630]

The Court then proceeded to quote section 5 of the Act of August 2, 1882, heretofore quoted in this opinion, and said:

"Under this statute it is the duty of the shipowners to provide a competent surgeon, whom the passengers may employ, if they choose, in the business of healing their wounds, and curing their diseases. The law does not put the business of treating sick passengers into the charge of common carriers, and make them responsible

for the proper management of it. The work which the physician or surgeon does in such cases is under the control of the passengers themselves. It is their business, not the business of the carrier. They may employ the ship's surgeon or some other physician or surgeon who happens to be on board, or they may treat themselves if they are sick, or may go without treatment if they prefer; and, if they employ the surgeon they may determine how far they will submit themselves to his directions, and what of his medicines they will take and what reject, and whether they will submit to a surgical operation or take the risk of going without it. The master or owner of the ship cannot interfere in the treatment of the medical officer when he attends a passenger. He is not their servant, engaged in their business, and subject to their control as to his mode of treatment. They do their whole duty if they employ a duly qualified and competent surgeon and medical practitioner, and supply him with all necessary and proper instruments, medicines, and medical comforts, and have him in readiness for such passengers as choose to employ him. This is the whole requirement of the statute of the United States applicable to such cases; and if, by nature of their undertaking to transport passengers by sea, they are under a liability at the common law to make provision for their passengers in this respect, that liability is no greater. It is quite reasonable that the owners of a steamship used

in the transportation of passengers should be required by law to provide a competent person to whom sick passengers can apply for medical treatment, and when they have supplied such a person it would be unreasonable to hold them responsible for all the particulars of his treatment when he is engaged in the business of other persons, in regard to which they are powerless to interfere."

In the case of Allan v. State S. S. Co., 152 N. Y. 91, 30 N. E. 482, the action was for damages alleged to have been caused by the ship's physician negligently giving plaintiff, a passenger on one of the defendant's vessels, a dose of calomel instead of qui-The Court of Appeals in an opinion by Justice Brown, concurred in by all the Justices, said:

"The defendant was a common carrier of passengers, and we need not discuss whether the common law imposed upon it any duty to treat those who were sick, nor whether it made it [631] responsible for their proper care or management. The duty that it assumed in this respect in this case was imposed upon it by the statute of Great Britain, under the laws of which it was incorporated."

The Court then proceeded to quote from the statute of Great Britain, which it says is similar to section 5 of the Act of August 2, 1882, and says:

"When the ship-owner has employed a competent physician, duly qualified as required by the law, and has placed in his charge a supply of

medicine sufficient in quantity and quality for the purposes required, which meet the approval of the Government officials, and has furnished to the physician a proper place in which to keep them, we think it has performed its duty to its passengers; that from that time the responsible person is the physician, and errors and mistakes occurring in the use of the medicines are not chargeable to the ship owner; and that no different rule is applicable to such mistakes as are the result of improper arrangement in the care of the medicines than to those which are the result of errors in judgment. The work which the physician does after the vessel starts on the voyage is his, and not the ship owner's. It is optional entirely with the passengers whether or not they employ the physician. They may use his medicines or not, as they choose. They may place themselves under his care, or go without attendance, as they prefer, and they determine themselves how far and to what extent they will submit to his control and treatment. The captain of the ship cannot interfere. The physician is not the ship owner's servant, doing his work and subject to his directions. In his department, in the care and attendance of the sick passengers, he is independent of all superior authority except that of his patient, and the captain of the ship has no power to interfere, except at the passenger's request. These views find support in Laubheim v. Steamship Co., 107 N. Y. 229, 13 N. E. Rep. 781, and in O'Brien v.

Steamship Co., (Mass.), 28 N. E. Rep. 266. The first case arose before Congress has legislated upon the subject, but it was said in the opinion that "If, by law or by choice, the defendant was bound to provide a surgeon for its ship, its duty to the passengers was to select a reasonably competent man for that office, and it is liable only for a neglect of that duty." The Massachusetts case was decided upon a statute of the United States similar to that of Great Britain, and it was there said that the shipowners "do their whole duty if they employ a duly qualified and competent surgeon and medical practitioner, and supply him with all necessary and proper instruments, medicine, and medical comforts, and have him in readiness for such passengers as choose to employ him." We think that is the extent of the requirement of the statute in this case, and, if there was any common-law liability resting upon the defendant to make provision for the care and attendance of its passengers when sick, it was no greater than that imposed by the statute." [632]

These opinions of course recognize that the statute imposes the duty to have on board a competent medical practitioner. Whether the vessel is liable for injuries caused by incompetency of the physician employed even though due caution was exercised in his selection and employment or is liable for damages caused by his incompetency only when it has failed to exercise due care in his selection and employment, it is unnecessary to decide in this case,

because there is no evidence to justify a finding that the surgeon was incompetent. That he did not treat libellant's injury as other physicians testify it should have been treated, I may say, as the evidence shows it should have been treated, does not prove he was incompetent. There is no evidence of any damages caused by incompetency. The vessel is not liable for the negligence of the surgeon or his failure to treat the injury, as there is no evidence of negligence in his selection and employment, and the evidence shows the exercise of due care in regard thereto.

It is therefore the opinion of the Court that libellant is not entitled to recover any damages of the vessel, and that judgment should be rendered accordingly.

(Sgd.) HORACE W. VAUGHAN, Judge U. S. District Court. [633]

In the District Court of the United States, in and for the District and Territory of Hawaii.

### IN ADMIRALTY—IN REM.

No. 147.

CLINTON J. HUTCHINS,

Libellant,

VS.

The American Steamship "GREAT NORTHERN,"
Her Engines, Machinery, Boilers, Tackle,
Apparel, Boats, Furniture and Appurtenances,

and

A. AHMAN, Master, Bailee and Claimant Thereof, and

THE GREAT NORTHERN PACIFIC STEAM-SHIP COMPANY, a Corporation, Owners Thereof,

Libellees.

#### Final Decree.

This cause having been heard on the pleadings and proofs and having been argued and submitted by the advocates of the respective parties and due deliberation having been had, and it appearing to the Court that the libellant has failed to prove and establish the material allegations set forth and contained in his libel and that in admiralty and justice he is not entitled to be granted the relief prayed for as set out and contained in the prayer of his libel, or to any relief or decree, and it further appearing that the libel filed in this suit should be dismissed with costs in accordance with the decision filed herein in this court on the 3d day of April, A. D. 1917, it is now ORDERED, ADJUDGED AND DECREED by this Court that the libel filed in this cause be dismissed with costs to be taxed against the libellant.

Done in open court in the courtroom of the United States District Court at the courtroom of said court in the Model Block, so-called, in the city and county of Honolulu, in the District of Hawaii, this 13th day of April, A. D. 1917.

(Sgd.) HORACE W. VAUGHAN, Judge of the United States District Court. [634] [Endorsed]: No. 147. (Title of Court and Cause.) Decree, Entered in J. D., Book #3, at folio 46. Filed April 11, 1917, at 2 o'clock P. M. A. E. Harris, Clerk. By (Sgd.) Wm. L. Rosa, Deputy Clerk. [635]

Proceedings, Decree Approved and Ordered Entered, Bond for Costs on Appeal Approved and Amount of \$1,000.00 Ordered for Bond to Stay Execution.

From the Minutes of the United States District Court, Vol. 10, page 419, Friday, April 13, 1917.

(Title of Court and Cause.)

On this day came Mr. George A. Davis, proctor for the above-named libellant, and also came Mr. L. J. Warren, of the firm of Smith, Warren & Whitney, proctors for the libellee herein, and this cause was called for hearing on Motion for Entry of Decree. Thereupon and after due hearing, said motion was granted and the Decree presented by Mr. Davis was approved and signed and ordered filed and entered. Thereafter Mr. Davis filed notice of appeal and the bond for costs and to stay execution was presented, and same having been approved as to form, the Court ordered that together with the amount of \$250.00 to cover the costs of appeal the further sum to stay execution be \$1,000.00. [636]

In the District Court of the United States, in and for the District and Territory of Hawaii.

### IN ADMIRALTY—IN REM.

# CLINTON J. HUTCHINS.

Libellant,

VS.

The American Steamship "GREAT NORTHERN," Her Engines, Machinery, Boilers, Tackle, Apparel, Boats, Furniture and Appurtenances.

and

A. AHMAN, Master, Bailee and Claimant Thereof, and

THE GREAT NORTHERN PACIFIC STEAM-SHIP COMPANY, a Corporation, Owners Thereof,

Libellees.

## Notice of Appeal.

To the American Steamship "Great Northern," Her Engines, etc., and to A. Ahman, Master, Bailee and Claimant of the Said Steamship, and to the Great Northern Pacific Steamship, a Corporation, Libellees in the Above-entitled Suit and to Messrs. Smith, Warren and Whitney, Its and His Proctors:

You and each of you are hereby notified that Clinton J. Hutchins, the libellant in this suit, intends to and does hereby appeal from the decision and final decree entered up in this suit to the United States

Circuit Court of Appeals for the Ninth Judicial Circuit, which said decision, final order and decree was made and entered up in this suit by the District Court of the United States in and for the District and Territory of Hawaii, and entered and filed in this suit on the 13th day of April, A. D. 1917, copies of which were served April 13, A. D. 1917, and you are hereby further notified that the said libellant in accordance with the rules of the United States Circuit Court of Appeals for the Ninth Judicial Circuit and, in accordance with the practice and procedure in admiralty, intends to and will make application for the leave of the Honorable United States Circuit Court of Appeals for the Ninth Judicial Circuit to make new proofs before said Court in support of the allegations and facts set forth and contained in the several paragraphs of the libellant's [637] libel filed in this suit.

Dated at Honolulu in the District of Hawaii this 13th day of April, A. D. 1917.

CLINTON J. HUTCHINS,

Libellant.

By His Proctors and Advocates,

THOMPSON, MILVERTON & CATH-CART, and

GEORGE A. DAVIS,

By (Sgd.) GEO. A. DAVIS.

[Endorsed]: No. 147. (Title of Court and Cause.) Notice of Appeal. Filed April 13, 1917. A. E. Harris, Clerk. By (Sgd.) Wm. L. Rosa, Deputy Clerk. [638] In the District Court of the United States, in and for the District and Territory of Hawaii.

### IN ADMIRALTY—IN REM.

No. 147.

CLINTON J. HUTCHINS,

Libellant,

VS.

The American Steamship "GREAT NORTHERN,"
Her Engines, Machinery, Boilers, Tackle,
Apparel, Boats, Furniture and Appurtenances,

and

A. AHMAN, Master, Bailee and Claimant Thereof, and

THE GREAT NORTHERN PACIFIC STEAM-SHIP COMPANY, a Corporation, Owners Thereof,

Libellees.

Bond on Appeal for Costs and Staying Execution.

KNOW ALL MEN BY THESE PRESENTS:
That we, Clinton J. Hutchins, residing at 57 Post
Street, in the City of San Francisco, in the city and
county of San Francisco, in the State of California,
and Bernice K. Dwight, residing at 1543 Makiki
Street, and W. C. Moore, residing at 1137 Third
Avenue, Kaimuki, in the city and county of Honolulu, District and Territory of Hawaii, are held and
firmly bound unto the American Steamship "Great

Northern," her engines, etc., and A. Ahman, master, bailee and claimant thereof, and the Great Northern Pacific Steamship Company, a corporation, owners of said steamship, the above-named libellees in this suit, in the sum of Two Hundred and Fifty Dollars (\$250.00), and in the further sum of One Thousand Dollars (\$1,000.00), to be paid to the said A. Ahman, master, bailee and claimant of said steamship, and the Great Northern Pacific Steamship Company, a corporation, owners thereof, or each or either of them, its successors, his heirs, executors, administrators or assigns, for the [639] payment of which said sums of money well and truly to be made we bind ourselves and each of us and each of our heirs, executors and administrators jointly and severally firmly by these presents.

Sealed with our seals and dated the 18th day of April, in the year of our Lord one thousand nine hundred and seventeen.

Whereas, Clinton J. Hutchins, the libellant in the above-entitled suit has appealed to the United States Circuit Court of Appeals for the Ninth Judicial Circuit from a decree of the District Court of the United States in and for the District and Territory of Hawaii, bearing date the 13th day of April, A. D. 1917, in a suit in which Clinton J. Hutchins is libellant versus The American Steamship "Great Northern," her engines, machinery, boilers, tackle, apparel, boats, furniture and appurtenances, and A. Ahman, master, bailee and claimant, thereof, and the Great Northern Pacific Steamship Company, a corporation, owners thereof, libellees, which decree orders the

said libellant, Clinton J. Hutchins, and his stipulators to pay libelees the sum of \$16.05, costs, to be taxed by the clerk, and whereas, the said Clinton J. Hutchins, the libellant herein desires during the process of such appeal to stay the execution of said decree of the said District Court.

NOW, THEREFORE, the condition of this obligation is such, that if the above-named appellant, Clinton J. Hutchins, shall prosecute said appeal with effect and pay all costs which may be awarded against him as such appellant if the appeal is not sustained and shall abide by and perform whatever decree may be rendered by the United States Circuit Court of Appeals for the Ninth Circuit in this cause, or on the mandate of said court by the court below, then this obligation shall be void; otherwise the same shall be and remain in full force and effect.

CLINTON J. HUTCHINS.

By (Sgd.) F. E. THOMPSON,

(Seal)

His Proctor and Attorney.

(Sgd.) BERNICE K. DWIGHT. (Seal)

(Sgd.) W. C. MOORE. (Seal) [640]

Sealed and delivered and taken and acknowledged, this 18th day of April, A. D. 1917, before me.

(Sgd.) RITCHIE G. ROSA,

Notary Public, First Judicial Circuit, Territory of Hawaii.

This bond is hereby approved as to form and amount and sufficiency of sureties.

(Sgd.) HORACE W. VAUGHAN,

Judge of the United States District Court for the District and Territory of Hawaii.

Dated April 18, 1917. [641]

United States of America, District and Territory of Hawaii,—ss.

Frank E. Thompson, one of the proctors for the libellant, Clinton J. Hutchins, and Bernice K. Dwight and W. C. Moore, being severally and duly sworn, each depose and says; that she and he resides in the city and county of Honolulu, in the District of Hawaii, and the said Frank E. Thompson, upon information and belief, says that the said Clinton J. Hutchins is worth the sum of \$2,000 over and above all his just debts and liabilities, and the said Bernice K. Dwight says that she is worth the sum of \$2500 over and above all her just debts and liabilities, and the said W. C. Moore says that he is worth the sum of \$2500 over and above all his just debts and liabilities.

(Sgd.) FRANK E. THOMPSON,

(Sgd.) BERNICE K. DWIGHT.

(Sgd.) W. C. MOORE.

Subscribed and sworn to before me this 18th day of April, A. D. 1917.

[Seal] (Sgd.) RITCHIE G. ROSA, Notary Public, First Judicial Circuit, Territory of Hawaii. United States District Court, in and for the District and Territory of Hawaii.

CLINTON J. HUTCHINS.

Libellant.

VS.

The American Steamship "GREAT NORTHERN," Her Engines, Machinery, Boilers, Tackle, Apparel, Boats, Furniture and Appurtenances, and [642]

A. AHMAN, Master, Bailee and Claimant, Thereof, and

THE GREAT NORTHERN PACIFIC STEAM-SHIP COMPANY, a Corporation, Owners Thereof.

Appellees.

## Notice of Filing Bond on Appeal.

Gentlemen and Sirs:

Please take notice that the bond on the appeal herein has been this day filed in the office of the clerk of the District Court of the United States in and for the District and Territory of Hawaii, and executed and given by Clinton J. Hutchins, corporation manager and capitalist of Number 57 Post Street, City of San Francisco and State of California, and whose residence is at Astor Avenue, in Berkeley, in said State of California, and Bernice K. Dwight, Campbell Block, Merchant Street, Honolulu, whose residence is at Number 1543 Makiki Street, and W. C. Moore, whose residence is at 1137 Third Avenue,

whose business address is Treasurer, Benny & Company, Limited, 134 Beretania Street.

Yours, etc.,

THOMPSON, MILVERTON & CATH-CART, and GEORGE A. DAVIS,

> Proctors for Appellant. By (Sgd.) GEO. A. DAVIS.

Honolulu, April 18, A. D. 1917.

To WILLIAM OWEN SMITH, L. J. WARREN and WILLIAM L. WHITNEY, Jrs., Esqrs.,

Proctors for Appellees.

[Endorsed]: No. 147. (Title of Court and Cause.) Bond on Appeal for Costs and Staying Execution. Filed Apr. 18, 1917. A. E. Harris, Clerk. By (Sgd.) Wm. L. Rosa, Deputy. [643]

No. 147. In the District Court of the United States, for the Territory of Hawaii. Clinton J. Hutchins vs. The American Steamship "Great Northern," Her Engines, etc. Assignment of Errors. Filed Apr. 16, 1917, at 11 o'clock and 10 minutes A. M. A. E. Harris, Clerk. Wm. L. Rosa, Deputy Clerk. R. [644]

In the District Court of the United States, in and for the District and Territory of Hawaii.

### IN ADMIRALTY—IN REM.

No. 134.

CLINTON J. HUTCHINS.

Libellant,

VS.

The American Steamship "GREAT NORTHERN," Her Engines, Machinery, Boilers, Tackle, Apparel, Boats, Furniture and Appurtenances,

and

A. AHMAN, Master, Bailee and Claimant Thereof, and

THE GREAT NORTHERN PACIFIC STEAM-SHIP COMPANY, a Corporation, Owners Thereof,

Libellees.

## Assignment of Errors.

Now comes the above-named Clinton J. Hutchins. libellant-appellant herein, and says:

That in the record and proceedings in the aboveentitled cause there is manifest errors, and said libellant-appellant now makes, files and presents the following assignment of errors upon which he will rely as follows, to wit:

The Court erred in dismissing the libel in this 1. suit.

- The Court erred in finding and holding that the admission in the libellee's answer that the libellant, while using or attempting to use the shower-room or compartment on the port side of the bath-room on sea-deck of said vessel and as set out more fully in the answer was not binding on the libellee, and that because one witness testified that the libellant did not slip upon the bottom of the basin, but that he lost his balance and fell on account of the motion of the vessel when he started to step into the shower-room and before he ever placed either foot upon the floor or basin thereof, in the [645] face of the admission contained in the answer and the proof adduced in support of the allegations contained in the libel that the libellant did fall in the compartment and was upon the floor of the basin of the shower-bath at the time he sustained the injuries as alleged in the libel was and is manifest error.
- 3. The Court erred in holding that upon the facts appearing from the trial of said cause, the weight of evidence was entirely on the side of the libellee as to the issue whether the master of the said steamship, the said steamship and the owners thereof, violated its and their marine contract in failing to supply and furnish the libellant with a safe place in which to bathe, the libellant sustained the injuries set out in the libel while in the act of taking a bath, which the libellee's testimony clearly shows was a dangerous place, and the marine contract entered into to carry the libellant safely from the port of San Francisco to the port of Honolulu was violated and broken, and the libellees were therefore responsible in damages.

- The whole of the testimony taken together sustains the allegations of the libel by a clear preponderance of the evidence and establishes that the showerbath and compartment and the approaches thereto and the basin itself into and upon which the libellant had one foot at the time he fell and sustained the injuries complained of was dangerous and unsafe, and there was and is manifest error in holding and deciding that the steamship and its owners were and are not liable for any damages for such injuries.
- 5. The Court erred in holding that upon the facts appearing from the trial of said cause the libellees were not to blame, and had not violated the marine contract entered into between the libellant, the master of the said steamship, the said steamship and the owners thereof, and there was manifest error in dismissing the libel.
- The Court erred in holding that the libellees were not liable under the testimony adduced in this suit for the gross incompetence of the physician and surgeon in their employ and on board [646] said steamship, and whose duty it was to treat sick and injured passengers skillfully, the preponderance of the evidence and the weight of the evidence clearly establishes that this physician and surgeon was both incompetent and unskillful.
- The Court erred in holding that the libellees had placed on board of said steamship and in charge of the medical and surgical department a competent physician, the burden of proof was upon the libellees to so establish that said physician and surgeon was both competent and skillful, neither of which facts

they established, nor is there any evidence to support this finding.

- 8. The Court erred in finding that the marine contract entered into between the libellant, the master of said steamship, the said steamship and the owners thereof, was not violated, and that a competent physician had been placed on board, the proof fails to show that the owners of said steamship, the master of said steamship, or any agent in their behalf, had exercised any care or the care required of them by statute in selecting the physician they did select.
- 9. The evidence discloses that the treatment of the libellant by the physician and surgeon in the employ of the libellees was unskillful, in fact that he rendered no surgical assistance to the libellant from the time of the happening of the accident down to and until the libellant reached the port of Honolulu, except to administer half a grain of codeine, and that he treated the fracture of the arm which the libellant sustained in the bath-room on board said steamship as a bruise, and that this evidence conclusively establishes both incompetency and unskillfulness on the part of said physician, for which the libellees were and are responsible.
- 10. The Court erred in finding that upon the facts appearing on the trial of said cause no damage had resulted to the libellant.
- 11. The Court erred in finding for the libellees and against the libellant.
- 12. The Court erred in finding and holding that neither the master of said vessel, the said vessel and the owners thereof, [647] violated the marine con-

tract nor committed breaches of said contract nor the duties or obligations arising therefrom as alleged in the libel, for the reason stated in the decision filed herein.

- 13. The Court erred in entering a final decree in favor of the libellees in this suit.
- 14. The Court erred in making, rendering and entering the final decree in this suit upon the findings and records therein.
- 15. The Court erred in rendering and making its decree in said suit because said decree was and is contrary to law, equity and admiralty and to the evidence, facts and pleadings as stated and shown in the pleadings and records in said suit.

In order that the foregoing assignment of errors may be and appear of record, the said libellant-appellant files and presents the same to said Court, and prays that such disposition on behalf thereof may be made as is in accordance with law and the statutes of the United States in such case made and provided, and said libellant-appellant prays a reversal of the said final decree heretofore made and entered up by said court.

Dated at Honolulu the 16th day of April, A. D. 1917.

CLINTON J. HUTCHINS,
By THOMPSON, MILVERTON & CATHCART and
GEORGE A. DAVIS,

By GEO. A. DAVIS, His Proctors. Recd. a copy of the foregoing assignment of errors this 16 day of April, 1917.

SMITH, WARREN & WHITNEY,
Proctors for Libellees. [648]

In the District Court of the United States, in and for the District and Territory of Hawaii.

### IN ADMIRALTY—IN REM.

### NUMBER 147.

CLINTON J. HUTCHINS,

Libellant,

VS.

The American Steamship "GREAT NORTHERN,"
Her Engines, Machinery, Boilers, Tackle, Apparel, Boats, Furniture and Appurtenances,

### and

- A. AHMAN, Master, Bailee and Claimant Thereof, and
- THE GREAT NORTHERN PACIFIC STEAM-SHIP COMPANY, a Corporation, Owners Thereof,

Libellees.

### Petition on Appeal.

The above-named libellant, conceiving himself aggrieved by the final decree made and entered in the above-entitled cause on the 13th day of April, A. D. 1917, wherein and whereby it was ordered, adjudged and decreed that the libel herein and the same is

hereby dismissed, and that said libellant pay to the libellees herein the costs and disbursements of said libellees in the above-entitled cause, taxed at \$725.27, does hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from said decree, for the reasons set forth in the assignment of errors filed herewith. And said libellant prays that his petition herein for his said appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said decree was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit. [649]

Dated, Honolulu, T. H., April 16th, 1917.

CLINTON J. HUTCHINS.

By THOMPSON, MILVERTON & CATH-CART and

GEO, A. DAVIS,

His Proctors.

## Order Allowing Appeal.

Upon the foregoing petition of Clinton J. Hutchins, libellant, praying for the allowance of an appeal in the above-entitled cause to the United States Circuit Court of Appeals for the Ninth Circuit, it appearing to the Court that said libellant has duly filed his assignment of errors as required by law, by the rules of said United States Circuit Court of Appeals for the Ninth Circuit; now, therefore,

IT IS HEREBY ORDERED that said appeal be and the same is hereby allowed as prayed for.

Dated, Honolulu, T. H., April 16th, 1917.
(Sgd.) HORACE W. VAUGHAN,

Judge of the United States District Court in and for the District and Territory of Hawaii.

### UNITED STATES MARSHAL'S OFFICE.

### Marshal's Return.

The within petition on appeal, and order allowing appeal, was received by me on the 16th day of April, A. D. 1917; and is returned as executed upon L. J. Warren, of the firm of Smith, Warren and Whitney, proctors for libellee; and R. B. Booth, treasurer, of F. L. Waldron, Ltd., a corporation, agent of the Great Northern Pacific Steamship Company, a corporation, owner of the steamship "Great Northern," by exhibiting to each of them the original petition on appeal, and order allowing appeal, and by handing to and leaving with each of them a certified copy of the within petition on appeal, and order allowing appeal.

J. J. SMIDDY, U. S. Marshal. By O. F. Heine, Deputy. [650]

[Endorsed]: No. 147. (Title of Court and Cause.) Petition on Appeal and Order Allowing Same. Filed April 16th, 1917. A. E. Harris, Clerk. By (Sgd.) Wm. L. Rosa, Deputy. [651] Filed Apr. 16, 1917, at —— o'clock and —— minutes —— M. A. E. Harris, Clerk. By Wm. L. Rosa, Deputy Clerk.

In the District Court of the United States, in and for the District and Territory of Hawaii.

### IN ADMIRALTY—IN REM.

#### NUMBER 147.

CLINTON J. HUTCHINS,

Libellant,

VS.

The American Steamship "GREAT NORTHERN,"
Her Engines, Machinery, Boilers, Tackle, Apparel, Boats, Furniture and Appurtenances,
and

A. AHMAN, Master, Bailee and Claimant Thereof, and

THE GREAT NORTHERN PACIFIC STEAM-SHIP COMPANY, a Corporation, Owners Thereof,

Libellees.

### Citation.

United States of America, District and Territory of Hawaii,—ss.

The President of the United States: To The American Steamship "Great Northern," Her Engines, Machinery, Boilers, Tackle, Apparel, Boats, Furniture and Appurtenances, and A. Ahman, Master, Bailee and Claimant Thereof, and The

Great Northern Pacific Steamship Company, a Corporation, Owners Thereof, Libellees, and to Messrs. Smith, Warren & Whitney, Their Proctors, Greeting:

You and each of you are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the city of San Francisco, in the State of California, within thirty (30) days from the date of this citation, pursuant to an appeal filed in the office of the clerk of the United States District Court in and for the District and Territory of Hawaii in the above-entitled proceeding, wherein the above-named Clinton J. Hutchins is [652] libellant, and you are the respective libellees, to show cause if any there be, why the decree entered in the above-entitled proceeding on the 13th day of April, A. D. 1917, in said appeal mentioned, and thereby appealed from, should not be corrected and reversed and speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable EDWARD DOUG-LAS WHITE, Chief Justice of the Supreme Court of the United States of America, this 16th day of April, A. D. 1917, and of the Independence of the United States the one hundred and forty-first.

## HORACE W. VAUGHAN,

Judge of the United States District Court in and for the District and Territory of Hawaii.

[Seal] Attest: A. E. HARRIS,

Clerk.

I hereby accept service of the within Citation and all other papers required on Appeal to the United

States Circuit Court of Appeals for the Ninth Circuit have been served upon me this day in this suit.

Dated Honolulu, T. H., April 16, 1917.

THE AMERICAN STEAMSHIP "GREAT NORTHERN," Her Engines, etc., and

A. AHMAN, Master, etc., and

THE GREAT NORTHERN PACIFIC STEAMSHIP COMPANY, etc., Libellees,

### UNITED STATES MARSHAL'S OFFICE.

### Marshal's Return.

The within citation was received by me on the 16th day of April, A. D. 1917, and is returned executed upon L. J. Warren, of the firm of Smith, Warren and Whitney, proctors for libellee; and R. B. Booth, Treasurer of F. L. Waldron, Ltd., a corporation, agent of the Great Northern Pacific Steamship Company, a corporation, owner of the steamship "Great Northern," by exhibiting to each of them the original citation, and by handing to and leaving with each of them a certified copy of citation.

J. J. SMIDDY, United States Marshal. By O. F. Heine, Deputy U. S. Marshal.

Dated at Honolulu this 16th day of April, A. D. 1917.

In the District Court of the United States, in and for the District and Territory of Hawaii.

# IN ADMIRALTY—IN REM.

NUMBER 147.

CLINTON J. HUTCHINS,

Libellant,

VS.

The American Steamship "GREAT NORTH-ERN," Her Engines, Machinery, Boilers, Tackle, Apparel, Boats, Furniture and Appurtenances,

and

A. AHMAN, Master, Bailee and Claimant Thereof,

and

THE GREAT NORTHERN PACIFIC STEAM-SHIP COMPANY, a Corporation, Owners Thereof,

Libellees.

## Praecipe for Transcript on Appeal.

To the Clerk of the United States District Court for the Territory of Hawaii:

You will please prepare a transcript of the record in the above-entitled cause, to be filed in the office of the clerk of the United States Circuit Court of Appeals for the Ninth Circuit, under the appeal and assignment of errors heretofore sued out and perfected to said Court, and include in said transcript the following pleadings, proceedings and papers on file, to wit:

- 1. Statement under Admiralty Rule 4.
- 2. Libel.
- 3. Monition.
- 4. Claim.
- 5. Appearance of Smith, Warren & Sutton.
- 6. Bond for costs, stipulation.
- 7. Bond to U. S. Marshal for release of said "Great Northern." [654]
- 8. Order of release.
- 9. Order extending time to plead.
- 10. Order extending time to plead.
- 11. Claimant's exceptions to libel.
- 12. Stipulation for taking testimony.
- 13. Stipulation for commission to take testimony.
- 14. Commission to take testimony.
- 15. Stipulation for commission to take testimony of B. R. Simons and order thereon.
- 16. Commission to take testimony.
- 17. Answer of claimant.
- 18. Notice of return and filing of depositions.
- 19. Stipulation for opening of depositions of Walter A. Scott, et al., and Barney R. Simons.
- 20. Motion to set cause for trial and notice thereof.
- 21. Amendment to libel.
- 22. Depositions of Francis G. Lefebre, libellant.
- 23. Depositions of Walter A. Scott et al., libellees.
- 24. Depositions of J. B. Morris and W. P. Metzler, libellee.
- 25. Depositions of B. R. Simons, libellees.
- 26. Libellant's Exhibit "A."
- 27. Libellant's Exhibit "B."
- 28. Libellant's Exhibit "C."

- 29. Libellant's Exhibit "D."
- 30. Libellee's Exhibit "1."
- 31. Motion to take depositions of C. W. Wiley.
- 32. Amended application and affidavit for commission to take testimony of C. W. Wiley.
- 33. Order for commission to take testimony of C. W. Wiley.
- 34. Direct interrogatories proposed on behalf of the claimant to be propounded to the witness C. W. Wiley.
- 35. Cross-Interrogatories proposed on behalf of the libellant to be propounded to the witness C. W. Wiley.
- 36. Commission to take testimony of C. W. Wiley.
- 37. Claimant's answer to paragraph 4a filed February, 16th, 1917, as an amendment to the libel. [655]
- 38. Libellee's Exhibit 2.
- 39. Libellee's Exhibit 3.
- 40. Libellee's Exhibit 4.
- 41. Deposition of C. W. Wiley.
- 42. Decision of Vaughan, Judge.
- 43. Final decree and motion for entry of same.
- 44. Notice of appeal.
- 45. Bond for costs and to stay execution.
- 46. Notice of entry of decree.
- 47. Petition for appeal, and order allowing same.
- 48. Assignment of errors.
- 49. Citation on appeal.
- 50. Clerk's minutes.
- 51. Transcript of testimony.

52. This praccipe.

53. Clerk's certificate to transcript.

Said transcript to be prepared as required by law and the Rules of the United States Circuit Court of Appeals for the Ninth Circuit, and filed in the office of the clerk of the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, before the 16th day of May, A. D. 1917.

> THOMPSON, MILVERTON & CATH-CART, and GEO. A. DAVIS.

> > Proctors for Appellant.

[Endorsed]: No. 147. (Title of Court and Cause.) Praecipe for Transcript of Appeal. Filed April 16th, 1917. A. E. Harris, Clerk. By (Sgd.) Wm. L. Rosa, Deputy. [656]

In the District Court of the United States, in and for the District and Territory of Hawaii.

## IN ADMIRALTY—IN REM.

CLINTON J. HUTCHINS,

Libellant and Appellant,

VS.

The American Steamship "GREAT NORTHERN,"
Her Engines, Machinery, Boilers, Tackle, Apparel, Boats, Furniture and Appurtenances,
Libellee,

and

A. AHMAN, Master and Claimant,

Appellee.

# Objections of Appellee to Printing of Unnecessary Portions of the Record Designated in Appellant's Praecipe and Designation by Appellee of Additional Portions of the Record to be Printed.

Now comes A. Ahman, master and claimant of the American steamship "Great Northern," appellee in the above-entitled cause, and, referring to the praecipe for transcript on appeal, filed herein by the appellant on the 16th day of April, 1917, now objects to there being included and printed at large in the transcript on appeal in said cause the several papers, documents and portions of the record in the United States District Court in the said praecipe designated as follows:

- 3. Monition.
- 5. Appearance of Smith, Warran & Sutton.
- 6. Bond for costs, stipulation. [657]
- 7. Bond to U. S. Marshal for release of said "Great Northern."
- 8. Order of release.
- 9. Order extending time to plead.
- 10. Order extending time to plead.
- 11. Claimant's exceptions to libel.
- 12. Stipulation for taking of testimony.
- 13. Stipulation for commission to take testimony.
- 14. Commission to take testimony.
- 15. Stipulation for commission to take testimony of B. R. Simons and order thereon.
- 16. Commission to take testimony.
- 18. Notice of return and filing of depositions.

- 19. Stipulation for opening of depositions of Walter A. Scott et al., and Barney R. Simons.
- 20. Motion to set cause for trial and notice thereof.
- 31. Motion to take depositions of C. W. Wiley.
- 32. Amended application and affidavit for commission to take testimony of C. W. Wiley.
- 33. Order for commission to take testimony of C. W. Wiley.
- 34. Direct interrogatories proposed on behalf of the claimant to be propounded to the witness C. W. Wiley.
- 35. Cross-interrogatories proposed on behalf of the libellant to be propounded to the witnesses C. W. Wiley.
- 36. Commission to take testimony of C. W. Wiley.
- 43. Motion for entry of decree (the final decree to be printed.

Said appellee does hereby offer on his part to make and enter into a stipulation with the appellant substantially in the form of the stipulation hereto attached and which proposed stipulation is now signed and tendered herewith to the end that the said stipulation may be made a part of the transcript on appeal in lieu of the several portions of the record hereinabove objected to.

Appellee states as the ground for his objection herein and for the tendering of said stipulation that the printing of the said portions of the record at length will unnecessarily enlarge [658] the record and occasion needless expense.

The appellee hereby designates as an additional portion of the record to be printed as part of the

transcript on said appeal, the reporter's transcript of the testimony of witnesses and showing the objections or rulings and orders made by the Trial Judge in the course of the trial of said action.

Dated, Honolulu, T. H., April 26, 1917.

A. AHMAN,
Master and Claimant.
By His Proctors,
SMITH, WARREN & WHITNEY,

Received a copy of the foregoing objections and the form of stipulation attached this 26th day of April, A. D. 1917.

(Sgd.) GEO. A. DAVIS, One of the Proctors for Libellant-Appellant. [659]

In the District Court of the United States, in and for The District and Territory of Hawaii.

## IN ADMIRALTY—IN REM.

CLINTON J. HUTCHINS,

Libellant and Appellant, vs.

The American Steamship "GREAT NORTHERN,"
Her Engines, Machinery, Boilers, Tackle, Apparel, Boats, Furniture and Appurtenances,
Libellee,

and

A. AHMAN,

Master and Claimant, Appellee.

# Stipulation for Reduction of Matter in Transcript on Appeal.

It is hereby stipulated and agreed by and between the parties to the above-entitled cause on the appeal thereof to the United States Circuit Court of Appeals for the Ninth Circuit, that the following portions of the record designated in appellant's praecipe for the transcript on appeal may be omitted from the transcript and the following summary statement substituted and printed in said transcript in lieu thereof, to wit:

Omit the following items designated in said praecipe:

- 3. Monition.
- 5. Appearance of Smith, Warren & Sutton.
- 6. Bond for costs, stipulation. [660]
- 7. Bond to U. S. Marshal for release of said "Great Northern."
- 8. Order of release.
- 9. Order extending time to plead.
- 10. Order extending time to plead.
- 11. Claimant's exceptions to libel.
- 12. Stipulation for taking of testimony.
- 13. Stipulation for commission to take testimony.
- 14. Commission to take testimony.
- 15. Stipulation for commission to take testimony of B. R. Simons and order thereon.
- 16. Commission to take testimony.
- 18. Notice of return and filing of depositions.
- 19. Stipulation for opening of depositions of Walter A. Scott et al., and Barney R. Simons.

- 20. Motion to set cause for trial and notice thereof.
- 31. Motion to take depositions of C. W. Wiley.
- 32. Amended application and affidavit for commission to take testimony of C. W. Wiley.
- 33. Order for commission to take testimony of C. W. Wiley.
- 34. Direct interrogatories proposed on behalf of the claimant to be propounded to the witness C. W. Wiley.
- 35. Cross-interrogatories proposed on behalf of the libellant to be propounded to the witnesses C. W. Wiley.
- 36. Commission to take testimony of C. W. Wiley.
- 43. Motion for entry of decree (the final decree to be printed).

It is further stipulated and agreed as follows:

That a monition was issued in said cause for the attachment of said vessel, her tackle, etc., on April 4, 1916, which was executed, returned and filed the same day.

Claim of said vessel was made and filed on April 4, 1916, by A. Ahman, master of said vessel, claiming the same on behalf of her owner, Great Northern Pacific Steamship Company, of Portland, Oregon. [661]

Appearance of Smith, Warren & Sutton was made and filed for the claimant April 4, 1916.

A stipulation for costs in the sum of \$500 was filed April 4, 1916, by Clinton J. Hutchins, libellant, as principal, and The United States Fidelity & Guaranty Company, as surety.

A bond for the release of said vessel was filed April

4, 1916, for \$30.00 with A. Ahman, Master, as principal, and The United States Fidelity & Guaranty Company, as surety; and an order of release of said vessel made the same day.

The time to plead was by successive orders of the Court extended to May 30, 1916.

Exceptions to the libel were filed by the claimant on May 27, 1916, and subsequently overruled by consent.

Under a stipulation filed June 13, 1916, a commission was issued, by order of the Court, on that date, to Ira A. Campbell, of San Francisco, California, to take the depositions *de bene esse* of A. Ahman, and any other witnesses called by either party.

Under a stipulation filed June 28, 1916, a commission was, by order of the Court, issued to Wm. H. Whitaker, of Philadelphia, Pennsylvania, to take the deposition of B. R. Simons.

Pursuant to a motion filed by the claimant February 21, 1917, and amended February 23, 1917, and order was made and filed February 23, 1917, and a commission issued thereunder to take the deposition of C. W. Wiley, of Seattle, Washington, which commission with direct and cross-interrogatories attached was issued February 24, 1917.

A motion for entry of decree was made by libellant on April 11, 1917, and heard April 13, 1917, on which last-named date the final decree was signed and filed.

Notice of entry of decree and service of a copy of decree was made and given, and the notice filed on April 14, 1917. [662]

Notice of appeal from final decree to the United

States Circuit Court of Appeals for the Ninth Circuit was filed April 13, 1917, in which notice it was stated that the libellant "intends to and will make application for the leave of the Honorable United States Circuit Court of Appeals for the Ninth Circuit to make new proofs before said Court in support of the allegations and facts set forth and contained in several paragraphs of the libellant's libel filed in this suit."

A bond on appeal for costs in the sum of \$250 and to stay execution in the sum of \$1,000 was filed April 18, 1917.

It is further understood and agreed that the transcript of testimony upon the trial of said cause will be included as a part of the transcript on appeal although not designated in the said praecipe.

Dated Honolulu, T. H., April 26th, 1917.

(Sgd.) WILLIAM O. SMITH,

(Sgd.) L. J. WARREN,

(Sgd.) SMITH, WARREN & WHIT-NEY,

Proctors for Appellee.

(Sgd.) THOMPSON, MILVERTON & CATHCART,

By (Sgd.) GEO. A. DAVIS,

Proctors for Appellant.

Approved May 31, 1917.

(Sgd.) HORACE W. VAUGHAN,
Judge.

[Endorsed]: No. 147. (Title of Court and Cause.) Objections of Appellee, etc. Filed Apr. 26, 1917. American Steamship "Great Northern" et al. 709

A. E. Harris, Clerk. By (Sgd.) Wm. L. Rosa, Deputy Clerk. [663]

## Proceedings at Taxation of Costs, Order Taxing Costs Against Libellant.

From the Minutes of the United States District Court, Vol. 10, page 448, Thursday, April 26, 1917.

(Title of Court and Cause.)

On this day came Mr. George A. Davis, one of the proctors for the libellant, and also came Mr. L. J. Warren, of the firm of Smith, Warren & Whitney, proctors for the libellee herein, and this cause was called for hearing on motion for taxation of costs. Thereupon and after due hearing, the Court allowed the amount of \$725.27 as costs taxable against the libellant. [664]

In the District Court of the United States, in and for the District and Territory of Hawaii.

IN ADMIRALTY—No. 147.

CLINTON J. HUTCHINS,

Libellant,

VS.

The S. S. "GREAT NORTHERN," etc., Libellee.

Order to Withdraw Exhibits from the Files. It is hereby ordered that the clerk of this court be permitted to withdraw from the files of this court for the purposes of sending to the clerk of the United States Circuit Court of Appeals for the Ninth Circuit, the following exhibits introduced in evidence in the above-entitled cause, the said above-entitled cause having been taken on appeal to the United States Circuit Court of Appeals for the Ninth Circuit, viz., Libellant's Exhibits "A," "B," "C," "D" (X-ray plates), Libellee's Exhibits 1, 2, 3, 4 (Letter, etc., certificates of recommendation), Claimant's Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 (three photos, log, voucher, voucher, voucher, list of repairs and improvements, receipted bills).

Dated Honolulu T. H., November 8th, 1917.

HORACE W. VAUGHAN,

Judge, U. S. District Court.

Filed Nov. 8, 1917, at —— o'clock and —— minutes —— M. A. E. Harris, Clerk. Wm. L. Rosa, Deputy Clerk. [665]

(Title of Court and Cause.)

Certificate of Clerk U. S. District Court to Apostles on Appeal.

I, A. E. Harris, Clerk of the United States District Court for the District and Territory of Hawaii, do hereby certify that the foregoing pages numbered from 1 to 665, inclusive, is a true and complete transcript of the record and proceedings had in said court in the above-entitled cause, as the same remains of record and on file in my office, and I do further cer-

tify that I hereto annex the original Assignment of Errors, Citation on Appeal, Orders Extending Time to Transmit Record on Appeal and Exhibits in said cause.

I further certify that the cost of the foregoing transcript of record is \$102.50, and that said amount has been paid to me by the appellants.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of this court this 8th day of November, A. D. 1917.

[Seal] A. E. HARRIS, Clerk U. S. District Court, Territory of Hawaii. [666]

[Endorsed]: No. 3084. United States Circuit Court of Appeals for the Ninth Circuit. Clinton J. Hutchins, Appellant, vs. American Steamship "Great Northern," Her Engines, Boilers, Tackle, Apparel, Boats, Furniture and Appurtenances, and A. Ahman, Master, Bailee and Claimant Thereof, and the Great Northern Pacific Steamship Company, a Corporation, Owners Thereof, Appellees. Apostles on Appeal. Upon Appeal from the United States District Court for the District and Territory of Hawaii.

Filed November 27, 1917.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien, Deputy Clerk.



#### IN THE

# **United States Circuit Court of Appeals**

FOR THE NINTH CIRCUIT.

CLINTON J. HUTCHINS,

Appellant,

VS.

AMERICAN STEAMSHIP "GREAT NORTH-ERN," Her Engines, Boilers, Tackle, Apparel, Boats, Furniture and Appurtenances, and A. AHMAN, Master, Bailee and Claimant Thereof, and THE GREAT NORTHERN PACIFIC STEAMSHIP COM-PANY, a Corporation, Owner Thereof,

Appellees.

## BRIEF OF APPELLANT.

Upon Appeal From the United States District Court for the District and Territory of Hawaii.

Frederick Milverton, Attorney and Proctor for Appellant.

THOMPSON & CATHCART, GEO. A. DAVIS,

Of Counsel.

## INDEX

	Page
STATEMENT OF THE CASE	1
Specification of Errors Relied on	8
Brief of the Argument	12
I. The findings of the Court below that the accident was not caused by any negligence of the appellees, and that they are not liable, are clearly against the weight of evidence, and are not binding on this Court	
I. The manner in which the accident occurred and the surrounding circumstances show that appellant was without fault and is entitled to recover	
2. The cause of the accident was a negligently constructed, dangerous, unsafe and unsuitable shower bath	
(a) As to the general construction and equipment	_
of bath	26
(b) As to whether the bath was equipped with a handle	55
3. This Court may review all of the evidence and determine the matters of negligence and liability in accordance with its own convictions based on the	
record	76
dangerous nature of the shower bath	79
(a) The burden of proof and presumptions	79
(b) The degree of care required of the carrier and the application of the rule	84
II. The employment of an incompetent physician and sur- geon for service on the vessel rendered the libellees lia- ble for the additional pain and suffering caused the ap-	
<ol> <li>The nature of the injury and its treatment by other physicians than the ship's surgeon indicated that there was but one proper method of treatment</li> </ol>	
1 1 -1	20

(

	Page
2. The actions of the surgeon of the vessel and his treatment of the injured man show gross incompetence	96
3. The evidence in the case overwhelmingly establishes that the surgeon of the vessel was grossly incompetent	103
4. The incompetency of the surgeon of the vessel caused the appellant pain and suffering that would not otherwise have resulted	109
5. The appellees did not exercise due care in the selection of a surgeon for service on the vessel	110
6. The legal liability of the appellees by reason of the employment of an incompetent physician	118
(a) The statute applicable	119
(b) The question of due care in the selection of the surgeon	120
(c) The incompetency of the surgeon of the vessel as a matter of law	125
(d) The statutory duty to furnish a competent surgeon on the vessel and the liability for negligence of the surgeon	126
ONCLUSION	131

## CITATIONS

	Page
Act of Aug. 14, 1855 (Great Britain)	128
Act of Congress, Aug. 2, 1882, c. 374, Sec. 5 (Sec. 8002)	
U. S. Comp. St. Anno.)	119
Ala. & F. R. Co. v. Waller, 48 Ala. 459	124
Allen v. State S. S. Co., 132 N. Y. 91; 30 N. E. 482	129
Albany, The, 81 Fed. 966; 27 C. C. A. 28	78
American S. S. Co. v. Landreth, 108 Pa. 264	86
Barnes v. N. Y. Cent. & H. R. R. Co., 89 N. Y. Sup. 608	82
Baulec v. N. Y. & H. R. Co., 59 N. Y. 356	125
Belle, The, Fed. Cas. 1271	24
Bradley v. Lehigh Valley R. Co., 153 Fed. 350; 82 C. C. A.	
428	83
Brinson v. Norfolk & So. Ry. Co., 86 S. E. 371; 169 N. C.	- 0
425	83
Brower, The A. G., 220 Fed. 648; 136 C. C. A. 256	76
Burrows v. Lownsdale, 133 Fed. 250; 66 C. C. A. 650	84
Caldwell v. New Jersey S. S. Co., 47 N. Y. 282	81
Carib Prince, The, 170 U. S. 655; 42 L. Ed. 1181	127
Ceballos v. The Warren Adams, 74 Fed. 413; 20 C. C. A.	,
486	83
Chapman v. Railway Co., 55 N. Y. 579	121
China, The, 74 U. S. 4; 19 L. Ed. 67	130
City of Panama, The, 101 U. S. 453; 25 L. Ed. 1061	80
City of Portsmouth, The, 125 Fed. 264	85
City & Suburban Ry. Co. v. Svedborg, 20 App. (D. C.) 543;	
194 U. S. 201; 48 L. Ed. 93580	0, 81
Columbian, The, 100 Fed. 991	71
Compagnie Générale Transatlantique v. Bump, 234 Fed. 52;	
148 C. C. A. 68	87
Cygnet, The, 126 Fed. 742; 61 C. C. A. 248	127
Editorial note, 48 L. R. A. 387	125
Elphicke, The C. W., 122 Fed. 439; 58 C. C. A. 428	127
Emma Johnson, The, Fed. Cas. 4465	89
Evansville & T. H. R. Co. v. Guyton, 115 Ind. 450; 17 N.	
E. 101124,	125
Fullerton, The, 221 Fed. 833; 128 C. C. A. 359	78
007	/

	Page
Gillum v. N. Y. & T. S. S. Co., 76 S. W. (Tex. Civ. App.)	
232	87
Gleeson v. Va. Midland Ry. Co., 140 U. S. 435	81
Glendale, The, 81 Fed. 633; 26 C. C. A. 50	77
Gypsum Prince, The, 67 Fed. 612; 14 C. C. A. 573	78
Hamburg-Amerikanische Paketfahrt Gesellscharf v. Gye, 207 Fed. 247; 124 C. C. A. 517	77
Hesper, The, 122 U. S. 226	77
Holmes, The C. S., 237 Fed. 785; 150 C. C. A. 529	78
Holmes, The C. S., 299 Fed. 970	123
Hrebrik v. Carr, 29 Fed. 298	86
Indiana Union Traction Co. v. Scribner, 93 N. E. 1014	81
Inland & Seaboard Coasting Co. v. Tolson, 139 U. S. 557.	81
International Mercantile Marine v. Smith, 145 Fed. 891;	0
76 C. C. A. 423	84
International Navigation Co. v. Farr & Bailey Mfg. Co.,	
181 U. S. 218; 45 L. Ed. 830	127
Kindell v. Hall, 8 Colo. App. 63; 44 Pac. 781	125
Korzib v. Netherlands-American S. N. Co., 169 Fed. 917	126
Laubheim v. De Koninglyke N. S. S. Co., 107 N. Y. 228;	
13 N. E. 781	121
Le Banc v. Sweet, 31 So. 766; 107 La. 355	81
Levy v. The Thomas Melville, 37 Fed. 271	76
Lobdell v. Bullit, 13 La. 348	85
Lucille, The, 19 Wall. 74	77
Mann v. Del. & Hud. Canal Co., 91 N. Y. 495	124
McCahan, W. J., Sugar Refining Co. v. The Wildcroft, 201	124
U. S. 378; 50 L. Ed. 794	83
McDonald v. Hospital, 120 Mass. 432	122
Mohns v. Netherlands American S. N. Co., 182 Fed. 323	144
	86
	86
Munson S. S. Line v. Miramar S. S. Co., 167 Fed. 960	76
Napolitan Prince, The, 134 Fed. 159	
Napolitan Prince, The, 134 Fed. 159	76 120
Napolitan Prince, The, 134 Fed. 159.  N. Jersey St. Railway Co. v. Purdy, 142 Fed. 955; 74 C. C. A. 125	76 120 80
Napolitan Prince, The, 134 Fed. 159	76 120 80 81
Napolitan Prince, The, 134 Fed. 159.  N. Jersey St. Railway Co. v. Purdy, 142 Fed. 955; 74 C. C. A. 125  New Jersey R. & Transp. Co. v. Pollard, 22 Wall 341  New World, The, 16 How. 469; 14 L. Ed. 1019	76 120 80 81 80
Napolitan Prince, The, 134 Fed. 159.  N. Jersey St. Railway Co. v. Purdy, 142 Fed. 955; 74 C. C. A. 125  New Jersey R. & Transp. Co. v. Pollard, 22 Wall 341  New World, The, 16 How. 469; 14 L. Ed. 1019  Ninfa, The, 156 Fed. 512	76 120 80 81
Napolitan Prince, The, 134 Fed. 159.  N. Jersey St. Railway Co. v. Purdy, 142 Fed. 955; 74 C. C. A. 125  New Jersey R. & Transp. Co. v. Pollard, 22 Wall 341  New World, The, 16 How. 469; 14 L. Ed. 1019	76 120 80 81 80

	Page
Norfolk & W. R. Co. v. Nuckols, 91 Va. 193; 21 S. E. 342.	124
Northern Commercial Co. v. Nestor, 138 Fed. 383; 70 C. C. A. 523	126
C. C. A. 230	126
North German Lloyd S. S. Co. v. Roehl, 144 S. W. 322 North Star, The, 169 Fed. 711	88 86
O'Brien v. Cunard S. S. Co., 154 Mass. 272	129 83
Pennsylvania Co. v. Roy, 102 U. S. 451; 26 L. Ed. 14184,	132
Rhode Island, The, Fed. Cas. 11,745	83
95	124
Rizzo v. Winnisimet Co., 104 N. E. 363; 217 Mass. 19	84
Santa Claus, The, Fed. Cas. 12,327	24
Santa Rita, The, 176 Fed. 893; 100 C. C. A. 360	77
Sapho, The, 94 Fed. 545; 36 C. C. A. 395	77
Secord v. Railway Co., 18 Fed. 221121,	122
Sherlock v. Alling, 93 U. S. 99; 23 L. Ed. 818	130
Southern Pacific Co. v. Cavin, 144 Fed. 348; 75 C. C. A. 350.	80
Sprague v. So. Ry. Co., 92 Fed. 59; 34 C. C. A. 207	80
State of California, The, 49 Fed. 172; I C. C. A. 224	78
T. & P. Ry. Co. v. Gardner, 114 Fed. 186; 52 C. C. A. 142	80
Totten v. The Pluto, Fed. Cas. 14,106	24
Treadwell v. Joseph, Fed. Cas. 14,157	83
U. S. v. Thompson, Fed. Cas. 16,492	130
Ward v. The Fashion, Fed. Cas. 17,154	24
Wells v. The Ann Caroline, Fed. Cas. 17,389	78
Western Stone Co. v. Walen, 151 Ill. 472; 38 N. E. 241	124
Whitney v. N. Y., N. H. & H. R. Co., 102 Fed. 850; 43	
C. C. A. 19	80



No. 3084.

IN THE

## **United States Circuit Court of Appeals**

#### FOR THE NINTH CIRCUIT

CLINTON J. HUTCHINS,

Appellant.

VS.

AMERICAN STEAMSHIP "GREAT NORTH-ERN," Her Engines, Boilers, Tackle, Apparel, Boats, Furniture and Appurtenances, and A. AHMAN, Master, Bailee and Claimant Thereof, and THE GREAT NORTHERN PACIFIC STEAMSHIP COM-PANY, a Corporation, Owner Thereof,

Appellees.

## BRIEF OF APPELLANT.

Upon Appeal From the United States District Court for the District and Territory of Hawaii.

## STATEMENT OF THE CASE.

On the 4th day of April, 1916, the appellant, Clinton J. Hutchins, filed in the United States District Court for Hawaii, a libel in rem against the American Steamship "Great Northern," etc., claiming the sum of \$15,700 damages, on account of injuries alleged to have been sustained by him while a passenger on the vessel.

The libel alleged that on or about February 14th, 1916, the libellant and his wife engaged first-class passage on the Steamship "Great Northern" for a voyage from San Francisco, California, to Honolulu, Hawaii, and return, and paid the full first-class rate charged for the same; that in consideration of the passage money, the libellant was to be provided with first-class accommodations; that it then and there became the duty of the steamship and its owners and officers to provide libellant with a safe passage, and to provide safe and proper appliances and equipment on the vessel so that libellant could make the voyage without harm or injury to himself; that in consideration of the passage money, and by reason of the agreement under which the libellant embarked as a passenger on the vessel, the libellant was to be furnished with a safe and proper place for bathing, and that it then and there became and was the duty of the vessel, and its owners and officers, to furnish and provide for the use of libellant, a safe and proper bath-room, with safe and proper equipment and appliances for the bath. (Tr., pp. 15-16.) These allegations of the libel were admitted by the answer. (Tr., p. 28.)

The libel further alleged that in violation of these agreements and duties, the rooms fitted up as shower-baths on the vessel were carelessly and negligently constructed so that they were dangerous and unsuitable for the purpose of taking a shower bath; that the base or bottom of the shower bath was a porcelain bowl about two feet square, with sides from three to four inches high, with a slight depression in the

center and a slope thereto from all directions to the drain in the center of the bowl; that the sides of the shower-baths were constructed of marble slabs, with service pipes for both hot and cold water running up the side of one of the slabs; that in order to reach and enter the shower bath, it was necessary to step over the top of the rim of the bowl; that by reason of such construction the bowl was slippery and difficult to stand upon; that there was no provision made by means of rails or otherwise, for grasping or holding on in case of slipping, nor was there any provision made by rubber mats or otherwise to prevent slipping or falling in the baths; that at all times, and more especially when wet, the bowls were slippery and dangerous; that such construction and equipment and lack of equipment made and rendered the shower baths unsafe and dangerous and was negligent and careless, as was to the vessel and its owners and officers then and there well known, and that notwithstanding such negligent and faulty construction, equipment and lack of equipment, and notwithstanding the dangerous character of the shower baths, they were held out and made known to all of the passengers, and more especially to the libellant, as proper and safe baths both in construction and equipment. (Tr., pp. 16-17.)

The libel also recited that on the morning of February 18th, 1916, while on board the "Great Northern," on the voyage referred to, the libellant, relying on such representations and agreements that the shower bath rooms were safe and usable, entered one of them for the purpose of taking a bath, having been

called for that purpose by the bath steward in charge; that without any fault or negligence on the part of libellant, as he stepped up over the rim of the porcelain bowl, and as soon as his feet were on the porcelain bowl, by reason of the slipperiness of the same and because of such faulty and negligent and careless construction, he slipped and fell; that he was thrown heavily on his left side, his left hand striking in the bowl of the bath opposite to the one he had entered, the construction of which was of the same kind, and that his hand slipping on the slippery porcelain bowl and the weight of his body coming on his arm, his left shoulder joint was fractured, and he sustained severe injuries and bruises and a severe shock to his nervous system. (Tr., pp. 17-18.)

The further allegations of the libel dealt with the nature of the injury, the pain and shock suffered by the libellant, and the expense incurred by libellant for medical attendance and treatment as a result of the injury, and concluded with the allegation that the broken shoulder joint and the bruises, shock, suffering and pain were occasioned and brought about by reason of the carelessness and negligence of the vessel and its owners and master, and without fault, want of care or negligence on the part of the libellant. (Tr., pp. 18-20.)

On February 16th, 1917, and before the hearing of any testimony, the libellant, having first obtained leave of court, filed an amendment to the libel. It was alleged in the amendment that it was the duty of the steamship, its owners and master, to employ, and keep

employed, and have on board the vessel, a competent and skillful physican to attend to libellant, and to exercise medical care and surgical skill in healing and endeavoring to heal and cure libellant of the injuries he had so received, and that it was also the duty of the steamship, its owners and master, to exercise the highest degree of care, and to render the best possible surgical and medical attention towards the libellant after he had sustained his injuries, in order to heal and cure him, and to continue to exercise the highest degree of care and skill towards him, after he had received the injuries, during the remainder of the vovage and until the arrival of the steamship at Honolulu. It was further alleged in the amendment that in violation of these duties and obligations, the steamship. its owners and master, did not employ and keep employed, nor furnish libellant with, a competent physician, but had an unskillful, incompetent physician on board the steamship, who failed and neglected to give proper care or exercise proper medical skill and attention towards libellant at any time during the voyage; that after libellant had received the injuries named, the incompetent physician treated the injuries unskillfully, negligently and improperly; that by reason of the incompetency of the physician the libellant suffered excruciating pain and torture after he had sustained the injuries and during the remainder of the voyage, because of the failure and neglect of the master and officers of the steamship towards him and because of the incompetency of the physician; that the physician did not make a proper examination of the broken shoulder joint and injuries, and did not use proper skill in attending to the same, but treated it as a bruise and was guilty of gross negligence, and that the vessel, and its owners and master, employed, and kept employed, such wholly incompetent physician during all of the voyage, with full knowledge of his incompetency. (Tr., pp. 35-38.)

The answer of the claimant denied practically all of the allegations of the libel, except the second relating to the engaging of passage by the libellant and the duty of the vessel to furnish first-class accommodation and a safe and proper place for bathing, and a portion of the fourth. This answer affirmatively alleged that the shower bath in question was properly constructed; that the alleged injury was not in any manner caused or contributed to by the style or mode of construction or equipment of the shower bath room; denied that there was no provision by means of rails or otherwise for grasping or holding on in case of slipping; alleged that the accident occurred while the vessel was traveling on the high seas and that if the libellant sustained any injury by reason of having slipped or fallen while using the bath-room, such injury was occasioned solely by his carelessness and negligence in his use of the bath, and further alleged that the libellant failed to give proper attention to his alleged injury and neglected the same, and thereby greatly aggravated his injury and increased his pain and suffering therefrom, and prejudiced and prevented the normal healing thereof. (Tr., pp. 27-32.) The fourth paragraph of the answer contained the following admission:

"Answering the allegation of paragraph 4 of said libel, this claimant has no knowledge except by information from others, but basing his answer thereto upon his information and belief, and, while admitting that the libellant, while using or attempting to use the shower room or compartment on the port side in the bath-room on 'C' deck of said vessel, lost his balance and fell and sustained some bruises or injury, the exact nature and extent of which are to this claimant unknown, yet \* \* "etc. (Tr., p. 29.)

The claimant also filed an answer to the amendment to the libel, which answer denied that the physician on board the steamship at the time referred to in the libel was incompetent, unskillful or negligent in his treatment and care of the libellant; denied that the physician when engaged by the owners of the vessel was known to them or to the master as being unskillful or incompetent, and denied that they employed or kept the physician employed knowing or believing him to be incompetent or unskillful. (Tr., p. 44.)

The hearing upon the issues thus made was commenced on February 16th, 1917 (Tr., p. 67), and concluded on March 20th, 1917, at which time the cause was argued and submitted. (Tr., pp. 424-425.)

A decision, or, as it is designated, an "Opinion of the Court on the Issues of Law and Fact in the Case," (Tr., pp. 645-676) was filed on April 3, 1917. (Tr., p. 426.) By this opinion the court found, among other things, that there was no negligence or liability on the part of the appellees, either by reason of the nature of the construction of the shower bath, or otherwise, held that there was no evidence to justify a finding that

the surgeon employed for service on the ship was incompetent, and concluded that Mr. Hutchins was not entitled to recover in the suit. This decision will be discussed more in detail under the heading of "Brief of the Argument."

A final decree, bearing date April 13th, 1917, was filed April 11th, 1917, dismissing the libel and awarding cost against the libellant. (Tr., pp. 677-678.)

A Notice of Appeal and Appeal, to this court, was filed by the libellant, Clinton J. Hutchins, on April 13th, 1917 (Tr., pp. 679-680), and this appeal was duly allowed and has been perfected.

The testimony adduced upon the hearing was directed mainly to the questions as to how the accident happened, the nature of the injury, the negligence or lack of negligence of the libellees in relation to the construction and dangerous condition of the shower bath facilities furnished, and the incompetency of the physician employed for service on the vessel. These are the principal questions involved upon this appeal, and they are raised by the Assignment of Errors filed in the court below (Tr., pp. 687-691) and incorporated in this brief.

### SPECIFICATIONS OF ERRORS RELIED ON.

- 1. The Court erred in dismissing the libel in this suit.
- 2. The Court erred in finding and holding, that the admission in the libellees' answer that the libellant was injured while using or attempting to use the

shower bath or compartment on the port side of the hath-room on the "C" deck of the vessel, as set out more fully in the answer, was not binding on the libellees, and erred in finding and holding against the libellant in this connection, upon the contradicted evidence of one witness, that the libellant did not slip upon the bottom of the basin, but that he lost his balance and fell on account of the motion of the vessel when he started to step into the shower-room and before he placed either foot upon the floor or basin thereof, in the face of said admission contained in the answer and the proof adduced in support of the allegations contained in the libel that the libellant did fall in the compartment and was upon the floor of the basin of the shower bath at the time he sustained the injuries alleged.

- 3. The Court erred in finding and holding upon the facts appearing on the trial of said cause, that the weight of evidence was entirely on the side of the libellees, upon the issue as to whether the said steamship and the owner and master thereof violated its and their marine contract by failing to supply and furnish the libellant with a safe place in which to bath.
- 4. The Court erred in finding and holding that the steamship and its owner were, and are, not liable for any damages on account of the injuries received by the libellant, for the reason that the whole of the testimony taken together sustained the allegations of the libel by a clear preponderance of the evidence and established that the shower bath, and compartment, and the approaches thereto, and the basin itself into

and upon which the libellant had one foot at the time he fell and sustained the injury complained of, were dangerous and unsafe.

- 5. The Court erred in finding and holding upon all the facts appearing on the trial of said cause, that libellees were not to blame and had not violated the marine contract entered into between the libellant and the said steamship, its owner and master.
- 6. The Court erred in finding and holding that the libellees were not liable under the testimony adduced in the cause for the gross incompetency of the physician and surgeon in their employ and on board of said steamship, whose duty it was to treat sick and injured passengers skillfully, because the preponderance and weight of the evidence clearly established that the physician and surgeon was both incompetent and unskillful.
- 7. The Court erred in finding and holding that the libellees had placed on board of said steamship, in charge of the medical and surgical department, a competent physician, because there was no evidence to support such finding.
- 8. The Court erred in finding and holding that the marine contract entered into by the libellant and said steamship and its owner and master, had not been violated, and in finding and holding that a competent physician had been placed on board, because the proof in said cause fails to show that either the owner of said steamship, the master of said steamship, or any agent in their behalf, had exercised any care, or the

care required of them by law, or by statute, in selecting the physician employed for service on said vessel.

- 9. The Court erred in finding and holding that there was no evidence to justify a finding that the said physician was incompetent, because the evidence conclusively established that the treatment of the libellant by said physician was unskillful, and further established both incompetency and unskillfulness on the part of said physician, for which the libellees were, and are, responsible.
- 10. The Court erred in finding and holding that upon the facts appearing on the trial of said cause no damage had resulted to the libellant.
- 11. The Court erred in finding for the libellees and against the libellant.
- 12. The Court erred in finding and holding that neither the said vessel, nor the owner thereof, nor its master, had violated the marine contract, nor committed breaches of said contract, nor the duties or obligations arising therefrom, as alleged in the libel.
- 13. The Court erred in entering a final decree in said case in favor of said libellees.
- 14. The Court erred in making, rendering and entering its final decree in said cause upon the findings and records therein.
- 15. The Court erred in rendering and making its final decree in said cause, because said decree was, and is, contrary to law, equity and admiralty, and contrary to the evidence, facts and pleadings in said cause.

#### BRIEF OF THE ARGUMENT.

The argument may be conveniently divided into two main parts, embracing the following propositions:

FIRST, that "The findings of the Court below that the accident was not caused by any negligence of the appellees, and that they are not liable, are clearly against the weight of evidence, and are not binding on this court"; and

SECOND, that "The employment of an incompetent physician and surgeon for service on the vessel rendered the appellees liable for the additional pain and suffering caused the appellant as a result of the incompetency."

In considering both of these propositions it becomes necessary to analyze the testimony somewhat carefully. Such an analysis will show that the findings of the court below on some of the main propositions involved are either against the great weight of the evidence or are entirely contrary to the evidence. Under these circumstances, this court is fully warranted, under the authorities, in examining the testimony and in drawing its own conclusions. There is no question but that the appellant was injured when about to take a shower bath on the vessel, and that he suffered great pain by reason of the injury. The testimony also shows that the appellant subsequently expended the sum of \$115 for medical services in connection with the injury. (Tr., pp. 92, 135.)

T.

The findings of the court below that the accident was not caused by any negligence of the appellees and that they are not liable, are clearly against the weight of the evidence, and are not binding on this Court.

I. THE MANNER IN WHICH THE ACCIDENT OC-CURRED AND THE SURROUNDING CIRCUMSTANCES SHOW THAT THE APPELLANT WAS WITHOUT FAULT AND IS ENTITLED TO RECOVER.

The manner in which the accident occurred was described by two witnesses, the appellant, Clinton J. Hutchins, and Barney R. Simon, who testified by deposition.

The testimony of Mr. Hutchins, who is a business man, 47 years old, and whose income from all of his activities and investments is from \$15,000 to \$20,000 a year (Tr., pp. 71, 72), was to the effect that on the night of the 17th of February, 1916, while a passenger on the steamship "Great Northern", between San Francisco and Honolulu, he notified the bath steward that he would like to have a shower bath the following morning, about half-past six. On the morning of February 18, 1916, at about the hour named, Mr. Hutchins was called by the bath steward and went over to the bath-room. He went up to the shower bath and put his right foot over into the bath. It was rather a high-sided bath and rather hollow. He put his foot in the bath, felt the temperature of the water on his arms, and then put his left foot over. He then slipped, put out his hand to catch hold of something, and fell over into a shower-bath that was on the opposite side. He fell sideways and reached

out for something to get ahold of but there was nothing. He felt a crunching in his shoulder, and his arm slipped from under him, so that it seemed to him that he had dislocated the shoulder. His arm went right against his head. He endeavored to get up but his whole arm was useless, and he did not seem able to get his breath. A man then came in and put his arm under Mr. Hutchins' neck, and Hutchins then reached up, got ahold of the knob of the door, and was lifted up still gasping for breath. At the time Mr. Hutchins fell both of his feet were in the basin. The surface of the basin was porcelain and at the time was filled with water and was very slippery. (Tr., pp. 74-77.) His feet flew out from under him, and he fell, as he says, "like a catapult." He threw out his left hand to break the fall and struck on his elbow. At the time he was facing the rear of the bath, with his back to the entrance. He fell on his left side. Mr. Hutchins says he did not lose consciousness at all. (Tr., pp. 80-83.) He had never been in that particular bath-room before he entered it on that occasion on the morning of February 18th. (Tr., p. 100.)

On cross-examination Mr. Hutchins testified that the shower-room in question was on Deck "C" and that prior to going into the shower-room where the accident occurred, as testified, he had never taken any shower on that trip. When he went into the room where the shower compartments were, the bath steward was there, and turned on the water, but was not there when the accident happened. Mr. Hutchins put his hands or arms in to test the temperature of the

water, before stepping in, but did not attempt to manipulate the faucet in any way so as to change the temperature. He was just going under the shower when he slipped. The water was splashing on to him just as he got in. He was part of the way under it when his feet flew out. He was not wholly under the water at the time. A good stream of cold water was coming straight down at the time; not in a fine spray but in heavy streams. At the time he slipped, he was bearing, if anything, heavier on the right foot than on the left. His left foot was over, and just as he got it down his feet flew from under him. He could not have used the marble slab on either side to support himself. He did not see how he could have used the marble slabs to have supported himself, because he went or fell out where there were no slabs, and there was nothing to hold on to. When he brought his left foot over and put weight upon it, both feet went from under him. He did not slip but just went straight out as if he were stepping on ice, his feet just flew from under him and he came down with a perfect crash. He could not state positively whether the water pipes were tight against the marble slab, but his impression was that they were, and that he could not have put his fingers behind them and got a hold. (Tr., pp. 122-127.) Another man came into the room just before Mr. Hutchins got up to take his bath. He was sitting down on the stool opposite to Hutchins and the libellant could not tell whether this man could see any portion of him or not. With the assistance of the man Mr. Hutchins regained his feet and was helped to the

stool where he sat until the man summoned the deck steward, and then sent for a doctor. (Tr., pp. 128, 129.) In falling Mr. Hutchins fell in the opposite shower compartment. He could not say how far in, but, judging from the way his arm flew from under him, he thought he went just over the edge of it, that is, his left arm went into the basin of the other compartment. Immediately after he fell, he was on his side bridged across between the two, his head in one shower and his feet in the other. In falling, both of his feet flew out, practically about the same time. When he felt himself go, both feet flew out and there was no stopping until he finally found he had struck something. His large toe was black the next morning. He had practically no warning whatever of the slip before it occurred. He grabbed out spasmodically with his right hand and then went down. (Tr., pp. 158-160.)

On redirect examination Mr. Hutchins further testified that when he fell he was just starting to step into the bath-room; he was leaning over with one foot over in the bath. He leaned over to test the water, putting it on his arms, etc., and then he pulled over the other foot and, just as he put in the other foot, he fell. He put his foot over just beyond the curve. The bowl curves and then slopes a little towards the center. He attributed his fall to the slippery condition of the floor, the slippery condition of the bowl, that is, he did not consider the bowl in its condition one that he would want to get into again. The water was running in the bowl, the steward having turned

it on. To his knowledge there was no lurch of the ship, and no movement on his part. If anything, he was leaning forward instead of upright, and there was no premonition of the fall. It was very quick. He was sure he reached out his right hand to grab before he fell. (Tr., pp. 173-174, 175.)

Barney R. Simons, testifying for the libellees, on direct examination, said that he was a dentist by profession and resided at Philadelphia, Pa. He was a passenger on the steamship "Great Northern" at the time Mr. Hutchins was injured. He described Mr. Hutchins as a man about five feet seven inches tall, weighing about 200 to 220 pounds, very heavy from the waist line up, enormously thick through the shoulders, rather short legged, and balanced as well as a man of that height and weight could be balanced. He was a heavy set man, probably between 55 and 60 years of age. This witness' recollection was that Mr. Hutchins slipped before he got in the shower, that is, between the two baths. It was in the shower-bath room. Mr. Simons was the only one present that saw the accident. (Tr., pp. 562-565.) When the witness entered the bath-room, Mr. Hutchins stood in the space between the two showers—the passage-way between the two showers. As he was a large man, he occupied practically the entire passage-way, so that the witness could not enter the shower opposite the one in which Mr. Hutchins was tempering the water. The witness sat down on the stool and observed Mr. Hutchins until such time as he might get out of the passage-way. Mr. Hutchins stood with his left hand against the wall, and with his right hand was tempering the water, or feeling the temperature of the water. The ship at about this moment lurched. At the same time Mr. Hutchins endeavored to step into the shower. He stepped with his right foot forward resting his weight on the left, when his left foot slipped from under him and he fell with his left shoulder upon the edge of the basin of the shower. He fell helplessly; that is, he had no chance to catch or save himself whatever as he fell. The witness went to Mr. Hutchins' aid, that is, dragged him from his position, catching him by the feet, got him into the lobby of the shower-room, and found that he was unconscious. (Tr., pp. 574-575.)

The deposition of this witness is rather confusing by reason of the fact that he testified with reference to a diagram he had evidently made, but the diagram was not made part of the deposition, was not apparently before the lower court, and is not in the record.

The witness Simons further stated on direct examination, that at the time Mr. Hutchins fell he was stepping under the shower. He slipped when his one foot was still in the passage-way and the other was in the air, and it was the foot that was still in the passage-way that slipped out from under him. This occurred coincident with the lurching of the ship. He stepped with the right foot, resting his weight on the left. The witness could not recollect whether he supported himself against the side of the shower or just stepped in, and could not say whether he dropped his left hand as he started to step under the shower. He did not see

that there was anything there to support him with his right hand. He could have got ahold of the slab on the after side of the shower with his right hand, but the witness could not say what support that would have given him. (Tr., pp. 576-577.) By saying that Mr. Hutchins had fallen very suddenly without opportunity to catch himself as he fell, the witness meant that he did not have an opportunity of getting his left hand under him to break the force of his fall. He fell without any possible way of catching or stopping himself, that is, he fell so quickly he could not get his hand out to save himself. It was simply as if you had pulled both legs from under him and he fell down. There was no opportunity to do anything. (Tr., pp. 581-582.)

On cross-examination the witness Simons testified that when he saw Mr. Hutchins standing with his left hand extended and against the rear wall and his right hand reaching into the shower space, he did not think Mr. Hutchins had an opportunity to grasp the marble frame at all as he fell. (Tr., p. 582.)

As bearing upon the manner in which the accident happened, there is considerable testimony in the record as to the condition of the weather at the time.

Mr. Hutchins, the libellant, testified on direct examination, that the condition of the sea at the time of the accident was calm. He did not notice any movement that morning. It was the only morning they had when there seemed to be none. The ship was not rolling or pitching that he noticed. (Tr., p. 77.) On cross-examination he said that he did not notice any

motion of the vessel at all as he stepped into the bath and would say that there was practically none. The morning was a calm one; there was scarcely a movement of the boat any more than on a very calm day. It was not perceptible. (Tr., p. 124.)

Mr. John B. Morris, the chief engineer of the "Great Northern," a witness for the libellees, testifying on direct examination, stated that he thought that on the day of the accident the ship was rolling quite a little. That was his best recollection. (Tr., p. 259.)

Mr. Charles Wall, Chief Officer of the "Great Northern," who testified by deposition on behalf of the libellees, identified the log-book of the ship, showing the weather conditions on February 18, 1916. (Tr., pp. 487-489.) This portion of the log-book was introduced in evidence and is Claimant's Exhibit No. 4. (Tr., pp. 546-547.) From this log-book the following appears:

"Time by Clock 4 (presumably 4:00 a. m.)...... Wind S. W. 2 Weather B Barometer 30 21 Thermometer 65 Remarks Fine and clear light breeze smooth sea heavy N W swell."

"Time by Clock 8 (presumably 8:00 a. m.)......
Wind South, 4 Weather B. q. Barometer 30 27
Thermometer 73 Fresh Breeze passing squalls small sea heavy Nly swell."

"Time by clock 12.....Wind S. W. 4. Weather B. C. Barometer 30 29 Thermometer 76 Remarks Fine weather mod breeze small sea mod swell."

Later in the log-book are the notations:

"Remarks fine weather, partly cloudy, mod N. W.

swell," "remarks fine and clear weather fresh breeze heavy Nly swell," and "remarks, fine weather mod breeze small sea heavy swell."

As it will be seen, it is impossible to say from this logbook what the condition of the weather was at the time of the accident, which the testimony shows was about 6:30 a. m.

Mr. George Grundy, a witness for the libellees, who also testified by deposition, further identified the logbook and said that the entries were made at the end of each watch of four hours. (Tr., pp. 494-496.) On cross-examination he explained the abbreviations and testified that the swell on the day of the accident was no heavier than it had been for previous days, that the sea was about the same, and that the swell was just about the same from the time the vessel got well out in the ocean until it reached Hilo. (Tr., pp. 496-498.)

Mr. Sam B. Stoy, manager of the London and Lancashire Fire Insurance Company at San Francisco, who was also called as a witness for the libellees, testified that he remembered the weather conditions on the vessel at the time of the accident and that, so far as ocean travel was concerned, the sea was fairly calm, that is, it felt so to his belief, and he was fairly comfortable. (Tr., pp. 533-534.)

On the other hand, the witness Barney R. Simons, who testified by deposition on behalf of the libellees, whose testimony as to the manner in which the accident occurred varies considerably from the statement of Mr. Hutchins, and who said that the age of Mr.

Hutchins was probably between 55 and 60 years, when, as a matter of fact, his age was 47 years, also testified as to the condition of the weather at the time of the accident. He said on direct examination that the weather then was bad and the sea was very rough; it was so rough that he could not sleep during the night. That morning when the steward called him and said his bath was ready, he did not want to go because of the pitching and rolling of the ship, and he told his wife he did not think he would go, but she said: "You haven't missed a morning bath in a year, and you may be sorry if you don't take one." So he got out very cautiously and went to the shower, supporting himself with his hand on each side of the passage-way as he went along. It was impossible, he said, to walk straight, unassisted, without holding on to the sides of the passage-way. (Tr., pp. 573-574.) At the time he took his bath that morning the ship was pitching and rolling and lurching occasionally. (Tr., p. 577.)

The Court in its decision, in commenting upon the evidence relating to the happening of the accident and the condition of the weather, relied wholly and solely upon the testimony of the witness Simons, notwithstanding its confusing nature and notwithstanding the fact that his statements as to the condition of the weather sharply conflict with the great weight of the evidence.

The Court, too, in its comment as to how the accident happened, said:

"There was an eye witness (Barney R. Simons) to the accident, whose deposition, if true, shows that the libellant fell before he ever entered the

bath-room, before he put either foot on the floor of the basin, and that his fall was caused by the rolling of the vessel, the libellant losing his balance when he started to step into the basin, one foot on the floor of the compartment outside the bath-room, the other raised for the purpose of stepping in." (Tr., pp. 660-661.)

It cannot be gathered from a reading of the deposition of Mr. Simons that the libellant fell before he entered the bath-room and that he lost his balance when he had one foot on the floor outside of the bathroom and the other raised for the purpose of stepping in.

The Court, however, found on the vague and contradicted evidence of Mr. Simons, that the libellant did not slip on the bottom of the basin, but that he fell because he lost his balance on account of the vessel lurching when he was about to step into the bath-room, and that his fall was not caused by any negligence of the vessel or its owners or servants. (Tr., pp. 661, 662.)

As we will show by the authorities later, this Court is at liberty, particularly where the consideration of depositions are involved, to wholly disregard the findings of the lower court and to form its own conclusions from an examination of the testimony.

The evidence overwhelmingly shows that at the time of the accident there was no such unusually rough weather as was testified to by Mr. Simons. It can fairly be assumed that the weather was normal, and the evidence as a whole in the case shows that the accident occurred without any fault or negligence on the part of the libellant, and while using an appliance

furnished by the libellees for use by the passengers of the ship.

The libel alleges that the accident occurred after the libellant had entered one of the shower-baths for the purpose of taking a shower bath therein. This was nowhere denied in the pleadings, but, in fact, was specifically admitted in the answer, as shown by the following extract:

"Answering the allegations of paragraph 4 of said libel, this claimant has no knowledge except by information from others, but basing his answer thereto upon his information and belief, and while admitting that the libellant, while using or attempting to use the shower-room or compartment on the port side of the bath-room on "C" deck of said vessel, lost his balance and fell and sustained some bruises or injury, the exact nature and extent of which are to this claimant unknown," etc.

The issues in the case, as made by the pleadings, did not leave it open to the court below to find or hold that the accident happened outside of the bath-room.

Neither party can contradict by proof the averments in his pleading, and the opposite party is entitled to rely thereon as an admission of facts.

> Totten vs. The Pluto, Fed. Cas. 14, 106; Ward vs. The Fashion, Fed. Cas. 17,154, at p. 185.

The allegations in the answer of a party admitting facts to his prejudice will prevail against testimony to the contrary.

The Santa Claus, Fed. Cas. 12,327. See, also,

The Belle, Fed. Cas. 1271.

Not only did the court below, in passing upon the manner in which the accident happened and the surrounding circumstances, find contrary to the great weight of the evidence, but it ignored absolutely the issues made by the pleadings and the admissions of the answer, and seems to have assumed that because it found that the vessel lurched at the time of the accident the libellees would be relieved from liability, ignoring the fact that it was their duty to furnish instrumentalities and appliances that would be safe in bad weather as well as in good.

2. THE CAUSE OF THE ACCIDENT WAS A NEGLI-GENTLY CONSTRUCTED, DANGEROUS, UNSAFE AND UN-SUITABLE SHOWER BATH.

The fact that the libellant fell, under the circumstances shown by the evidence, while using a bath-room furnished by the vessel without any fault or negligence on his part so far as the record shows, entitles him, as a matter of law, to recover, unless it further appears affirmatively that the libellees were without fault and were not guilty of any negligence. Much of the evidence in the case was directed to the question as to whether the shower bath was safe, and inasmuch as there is practically no conflict in the evidence as to the manner in which it was constructed, and its arrangement, this Court is as well able to pass upon the question as the court below. The only real conflict in the evidence concerning the shower bath arises by reason of the different opinions of the witnesses as to its safety, and with all the facts before it, this Court can as well form its own conclusions and opinions as the witnesses in the case, or the court below.

The following is a fair abstract and synopsis of all of the evidence in the case upon this point. As the witnesses, A. Ahman, John B. Morris, C. S. Mills and W. H. Metzler testified in open court their depositions (Tr., pp. 436, 475, 466, 504, 613) were not offered or received in evidence. (Tr., pp. 241-242.)

(a) As to the general construction and equipment of the bath.

The libellant, Clinton J. Hutchins, testified that the surface of the shower bath was of porcelain, and at the time of the accident was filled with water and very slippery. He thought the bowls were about two and a half feet square and perhaps five or six inches deep, slightly concaved towards the middle, and with a drain in the middle of the bowl. Three sides of the bath were of polished marble, and there were two pipes running up. (Tr., p. 77.) One he supposed conducted the hot water and the other cold water to the bath. The pipes were tight against the wall and you could not get your hand around them. (Tr., p. 80.) The surface of the bath was smooth, glazed porcelain. (Tr., p. 81.)

On cross-examination Mr. Hutchins testified that he should say that it was two feet six or so, something over two feet between the two compartments on the floor (Tr., p. 128). The porcelain surface of the basin was glazed. He used to be in the plumbing supply business at one time, he said, and was pretty

familiar with such things. It was what is known as Imperial ware. It was different from the ordinary iron white porcelain bath tub. He thought the surface was much more smooth. It was perfectly smooth, glazed. Tr., pp. 157-158.) Sometime after the accident he went into the shower room again to examine it. He had complained about the condition of the shower as it was maintained by the ship, and he went to see whether any change had been made in the shower of any kind. He recommended to Mr. Stone that they tear out the slippery bowls and put in smooth concrete so that it would hold. He had always seen in all ocean trips he had made either a large railing or a firmly fixed handle to hang on to, or a grating for the shower, in the shower baths. (Tr., pp. 164-165.)

On redirect-examination Mr. Hutchins said that he thought one of the pipes he mentioned was for hot water but he could not tell of his own knowledge. There was no door into the bath compartment but there was a rubber curtain over the entrance which had been pulled back when he went into the bathroom. There were two bath-rooms there with a hallway or passageway between of about two and a half feet. There was a light in the ceiling of the bathroom (Tr., pp. 171-172).

On recross-examination (Tr., pp. 175-176) Mr. Hutchins said that the curtain was just about in the position shown by Claimant's Exhibit No. 3 (Tr., p. 545).

Francis G. Lefebre, who testified by deposition on behalf of the libellant, said that at the time of the accident he was employed on the steamship "Great Northern" as a waiter. He further testified that at that time there was no mat on the floor of the shower bath where the accident occurred. Tr., p. 598.)

H. E. Wescott, a witness for the libellant, who resides in Honolulu, and who is the purchasing agent for the City and County of Honolulu, testified on direct-examination that in the latter part of March, 1916, he had occasion to visit the bath-rooms on the steamship "Great Northern" in company with Mr. Bicknell, the City and County Auditor. (Tr., pp. 204-206.)

On redirect-examination he stated, among other things, that they looked at the shower bath in question and it looked pretty slippery. (Tr., p. 210.)

W. H. Metzler, who described himself as a special agent of the "Great Northern Pacific Steamship Company," testified for the libellees. He said on direct-examination that the water pipes shown on the two photographs, Claimant's Exhibits 2 and 3 (Tr., pp. 544, 545) showed the shower baths as they were at the time of the accident except for the installation of some soap dishes. The water pipes shown on the photographs were far enough from the wall to enable a person to get his fingers behind them. One of the pipes was for hot water, the other for cold water, and the center pipe conducted the water to the shower. (Tr., pp. 216-217.)

On cross-examination Mr. Metzler said that he ex-

amined every shower bath on all the decks on the day of the accident. There had been some complaint about the hot and cold water not working just right. These pipes were pretty close together and he did not know which one was the hot water pipe. He thought the one on the right. A man visiting there for the first time might be liable to catch hold of the hot water pipe, but he did not know whether that would burn him. He did not think it was as hot as that. He did not know that a man had gotten his hands blistered in catching hold of the pipe. He could not say off-hand how far the pipes were from the wall. but you could get your fingers around all right. He did not recall that he had tried it. He never tried to get his fingers in that he recalled. (Tr., pp. 222-224.) The handle shown turned on both the hot and cold water. The lever was used to mix the water. He did not know what the temperature of the hot water was, but it was perfectly safe to catch hold of the pipe. The complaint he referred to that the water did not properly mix was due perhaps to not knowing how to regulate it. Tr., pp. 226-227.)

J. B. Morris, chief engineer of the vessel, also testified on this point for the libellees. He said that Mr. Hutchins, the day after the accident, told him that in stepping in the shower he had stepped on the rounding of the base, just opposite the cross in the picture, Claimant's Exhibit No. 1 (Tr., p. 543), and also stated that at that time the shower baths were not properly built, instead of being round they should be square, that they should have square corners. The

witness understood Mr. Hutchins further to say that as he was stepping in the shower room his foot slipped on that rounding. The hot and cold water pipes were about two and a half inches from the wall. There was plenty of room behind the pipes for a man to get his hand in. He was not sure which was the hot and which was the cold water pipe. The floor of the basin in the shower compartment was about two and a half feet square, including the room. The basin itself would be three inches less. There was a slope towards the center of the basin of about one-half inch to drain it off. The facilities in the compartment for a person using the same to support himself were, first, the handles or grab bars, then the curtains, which were put up strong enough to hold the weight of a person provided he should fall; then the marble side of the shower. A person could grab the side of the marble slab and then grab either of the pipes, or with his left hand could grab the door knob. There were four things a person could grab hold of, the wall, the curtain, the grab bar and the pipes. The witness in this connection was testifying with regard to conditions as shown by Claimant's Exhibit No. 2 (Tr., p. 544). The witness also said that the base of the compartment or basin was made of tiling, porcelain, the same as the porcelain used in the ordinary porcelain bath tub. The witness had traveled on probably seventeen different passenger steamers as an officer. None of these were fitted with similar shower arrangements, but the showers were arranged over the ordinary porcelain bath tubs. (Tr., pp. 243-248.)

Counsel for appellees then attempted to qualify the chief engineer of the steamship as an expert on bath tubs. The engineer said that he had given attention to the matter of equipment and bath-room facilities on board of vessels where he had served as an officer, as well as to the matter of selecting the appliances to be installed, and the matter of safety facilities for the persons using the installations. Aside from the answers based on these general questions, however, no special qualification was shown (Tr., pp. 248-249). Mr. Morris further testified on direct-examination that the radius of the circle in the corner of the bowl was about an inch and a half. The drain or strainer in the center was probably three and a half inches in diameter. The bath-room was well lighted. The witness said he looked after the building of the showers on the "Northern Pacific," and said that in his opinion the shower bath could be used with perfect safety, because every means that he knew of had been provided for. He had not in his experience known of any shower room or compartment with any other facility or device that he had known or heard of that was absent from this particular compartment. (Tr., pp. 251-254.) The vessel had carried probably 80,000 passengers since she was built and the shower baths were continually used. No complaint had been made to him as an officer of the company as to the manner of construction or the condition of the shower baths prior to complaint made by Mr. Hutchins. He did not make inspections of the shower baths aboard the vessel regularly, but he had a man that did. He

thought that if a shower compartment of this character was furnished with a rubber mat in the bottom of the basin it would be dangerous, because if one were to rub themselves down with soap and his feet would be soapy, he would have a tendency to slip and slide on rubber more so than on porcelain. (Tr., pp. 255-258.) This opinion of Mr. Morris, which was given against the strenuous objection of counsel for the libellant, was not based in any manner upon any special showing of qualification.

Mr. Morris was later recalled, on behalf of the libellees and testified that the rod shown on the photograph was intended to hold the curtains so that when a person went in the shower, he could be closed in the shower bath by drawing the curtains. When the rods were put in they had to take into consideration that they must be strong enough to sustain the weight of a person who might grab the curtains and bear them down. The rods were about one and a half inches in diameter and were secured by bolting on to the marble slab on the other side. They would sustain the weight of a man over 200 lbs. The only purposes or offices of the rods were to hold the curtains surrounding the shower baths. That was the only purpose they are used for. A demand might be made on the rod at any time to hold the weight of a person when the ship was rolling, when one would have a tendency to grab anything to hold themselves. Since the photographs were taken the mixing valve had been changed. (Tr., pp. 298-300). In view of his study of the subject and of the experience he had already indicated, and

irrespective of whether or not he had seen any improvements or devices elsewhere, he said that he could not suggest any additional facilities, or method of construction, or arrangement of any kind which, if incorporated or used in the shower room, would in his opinion be a further safeguard to persons using it. (Tr., p. 201.) He enumerated a number of vessels upon which he had served as engineer, and none of these vessels, excepting the "Great Northern," and its sister ship the "Northern Pacific" had regular shower baths or compartments of the kind on the "Great Northern," where the accident occurred. They had just an ordinary porcelain tub where the shower was arranged to play into the bath tub while a person was standing in it. (Tr., p. 302.) In his opinion, a person would have more chance to hold on to something in a shower bath such as was on the "Great Northern" than in the ordinary bath tub (Tr., p. 303).

It will be noted that the only facilities furnished in the shower bath on the "Great Northern," and upon which the chief engineer based his conclusion that the bath-room was a safe one, were a small door knob, water pipes, one of which was for hot water, a rod and curtain, which, upon a person entering the bath would be at his back and above him, a smooth marble slab, and a tiny handle attached to a marble slab at the far end of the bath, which last, in all probability, if a great mass of evidence is to be believed, was not there at the time of the accident at all.

On cross-examination Mr. Morris further testified that when a bather is standing in the shower bath

where the accident happened, that is, after he gets in with his face to the wall, he would have a chance to catch hold of the curtain rod, although the witness admitted that the rod would be right behind him, that he would have to put his hands behind and reach back to catch it, and that it was probably six feet high. He admitted, however, that this would not be the natural way for a man to do. He thought the distance between the slab and the pipes was about two and a quarter inches, although he had never measured it. He remembered looking at it and judging the distance. The handles on the valve had been taken out on account of the difficulty in mixing and it being too much trouble to overhaul them. They leaked and would not mix properly, so it was thought a better arrangement to put two valves on. One of the pipes that ran up the side of the marble slab was for hot water. The nearest one to a person's left hand was the cold water pipe. The hot water pipe would be about the same distance from a person's right hand as the cold water pipe. (Tr., pp. 319-323.)

A. Ahman, the master of the steamship "Great Northern," which was built at William Cramp & Sons' shipyards at Philadelphia, testified for the libellees, and on direct-examination said that he had been operating passenger ships since 1886, practically all over the world, but largely on the Pacific China trade, and to Japan, Panama and Central America. He had been in no ships that had been equipped like the "Great Northern" was, with bathrooms and showers separate. He had observed on the other vessels

just what the equipment and facilities for bathing on passenger vessels as a rule were, and on all the vessels in general that he had seen there had just been a shower on top of the bath tub, that is, over one of the round porcelain baths. (Tr., pp. 263-267.) He repeated that none of the steamships he had referred to were equipped with shower baths of the kind on the "Great Northern," except its sister ship "The Northern Pacific" (Tr., p. 269). In describing the bath in question he said that it was on the port side. On the right hand side was a marble slab about thirty inches wide, and on the left hand side was also a marble slab of similar size against the wall of the heater-room. Across, on top of the entrance, was a bar for assisting in going into the shower room and used also as a curtain rod. It answered two purposes. In the bottom of the shower was a porcelain basin, slightly lower towards the center, sloping probably one-half an inch to an inch from the edges, and on the entrance was a sort of wash board, or a coaming, rounded up to three inches on the outside, and about the same on the inside, with a rounded top, and directly on the wall was a grab handle or grab iron. As to the other facilities for purposes of safety to a person using the bath, there was a good sized door knob on the door to the heating room, which could also assist a person going in there if he did not want to reach up with his right hand and get a hold of the bar or grab iron. (Tr., p. 270.) He did not know which of the pipes on the left wall of the shower compartment, as shown in the photograph, was for the hot

water. He guessed the handle showing on the photograph was there now, but the valves were changed after the accident on account of their being worn out and leaking. On being asked what his observation was of shower bath facilities with a view of determining the features of safety in their use, the witness said he did not see any way the baths could be improved on, and that he had seen no ships that had the same facilities for bathing that they had on the "Great Northern." They were absolutely the best he had ever seen. On being asked again whether he had given attention to the point of safety of shower baths, generally speaking, he merely replied that he could see nothing wrong with them and he did not know of any improvement that could be made from the standpoint of safety unless two assistants were placed there to hold people up from falling down. There was a light right in the center of the deck that would show all over the bathrooms and the showers. (Tr., pp. 273-276.)

On cross-examination Mr. Ahman said that he did not know from a personal examination of the shower bath whether on the morning of the accident it was slippery or not. He did not think the hot water pipe against the slab was hot enough to blister a person's hands, but he had never tried it, and would not try it. (Tr., pp. 283-284.) The bowl of the shower was made of porcelain and he did not think that porcelain was more slippery than zinc. It was not positively smooth porcelain, not highly polished, not glazed. It was not what is called glazed porcelain. He would

call it frosted porcelain. On being asked whether it was very slippery he said he would not say it was any more slippery than zinc, and being asked again if it was not slippery, he said he would not say it was. He said also that if wood was wet it would probably be more slippery, and that he honestly believed it was not any worse than standing on dry wood. He would be willing to swear that the porcelain bowl was not more slippery than the zinc edge of a mat indicated by counsel in the courtroom, which the witness said he could see from where he was being examined. (Tr., pp. 285-286.)

Such far-fetched opinions of course refute themselves.

Walter A. Scott, testifying on direct-examination for the libellees, by deposition, said that he was a photographer and as such, on May 1st, 1916 (almost two months and a half after the date of the accident). took the photographs received in evidence and marked Claimant's Exhibits Nos. 1, 2 and 3 (Tr., pp. 543, 544, 545). The white line on the right side of the picture, Claimant's Exhibit 3 (Tr., p. 545), represented a marble slab about an inch and a half in thickness. The handle in the center of the picture was fastened to the back wall of the shower by four screws. The pipes on the left hand side of the picture were there when the photograph was taken. door knob, he judged from the protograph, was metal, but he did not observe it carefully at the time. The basin shown in Claimant's Exhibit No. 1 (Tr., p. 543) was made of the same material that porcelain bath tubs were made of . (Tr., pp. 430-433.)

H. K. Relf, General Claim Agent of the Great Northern Pacific Steamship Company, residing at Portland, Oregon, also testified by deposition on behalf of the libellees. He said he examined the shower bath in question after February 18th, 1916, he thought on the return of the vessel from Honolulu. He had seen this shower approximately about once a month. He did not make regular inspections or anything of that kind, but looked over the ships when he was on them. He should say he had seen the shower bath six or eight times since the accident happened. He employed the photographer to make the photographs introduced in evidence. (Tr., pp. 453-455.) He described the shower bath as follows:

"The room in which these shower-baths are located is on the 'C' deck, almost amidships. entrance to the rooms is from the passageways on both sides of the ships. There are two showers in this room on the 'C' deck opposite each other. The base or receptor of the shower bath is thirty inches square. The rim is six inches high, the top of the rim being six inches above the tile floor out of the bath room. The bottom of this rim is about three and a half inches in width; from the edge of the receptor to the waste in the middle of it there is a fall of a quarter of an inch in a distance of eleven inches or eleven and a half inches. The shower in which Mr. Hutchins went to take his bath, as I was informed by the bath steward, was located upon the port side of the ship. Upon entering that shower there would be a marble slab on his right hand; the slab is about one inch in thickness, 76 inches high and 32 inches wide. On

the left of the shower bath there is another marble slab which is up against the wall of the heaterroom, and the door which is shown in the photograph is the door to the heater-room. Then on the marble slab to the left of the person as they are facing the shower baths are three pipes with valves which are used in regulating the flow of water and the temperature of the water. back wall of the shower is another marble shower (slab?), to which is attached a grab or hand-hold. which is 60 inches above the floor of the room. At the upper part of the slab is a rod about an inch and a quarter or an inch and a half in diameter on which a curtain is sustained by means of Opposite to this particular shower bath compartment is another identically the same in construction. There is a space of 261/2 inches between the two receptors." (Tr., pp. 455, 456.)

From this description it appears that the curtain rod is approximately six feet four inches above the floor of the shower bath.

This witness further testified on direct examination that the door of the heater-room is supposed to be kept shut, except when the attendant has occasion to use it. Entering the shower-bath, the facilities that presented themselves to a person desiring to take a bath to safeguard himself from falling were, the marble slab on his right hand, a rod above him about 72 inches from the floor, and the three pipes on his left hand, the first of which was a cold water pipe. A person could catch hold of the cold water pipe, and then, by reaching over to the grab on the back wall of the shower-bath the witness said would be the best means of protecting himself or steadying himself while stepping into the receptor. The door knob, the wit-

ness also said, was available and could be used for that purpose. The curtain slides on rings, and if a person wished he could take hold of the curtain itself, which was treated in some way to make it water proof. The floor of the bath was composed of tiling. The base or receptor of the showerbath was porcelain. witness did not observe anything about that base that was difficult to stand upon or that would be more difficult than any other porcelain slab would be to stand upon, and could not see anything dangerous about it. Neither could he conceive of any improvement that could be made. So far as he could see there was every safeguard, every facility that a person would want in order to protect himself and keep from falling. The metal handle was fixed against the slab. (Tr., pp. 456-459.)

Although the witness was very positive in his opinions as to the safety of the shower-bath, there was nothing in his testimony to show that he was specially qualified to give expert testimony in such matters, or that his testimony had any greater value than the opinion of the ordinary non-expert person.

On cross-examination Mr. Relf testified that he had been connected with the Great Northern Pacific Steamship Company since January, 1915, and had also acted as General Claim Agent of the railroad lines that were affiliated with the steamship company. He had made no particular examination of the showerbath in question until after the accident occurred. (Tr., pp. 459-460.) The rim of the receptor or basin was three and a half inches in width at the bottom

and the inside of the rim sloped one-half inch so that at the top the thickness of the rim would be about three inches. The inside of the rim sloped threeeighths of an inch instead of one-half an inch. The basin inside at the bottom would be twenty-three inches square. The waste in the middle was about three inches in diameter. There was a small metal cap with holes in it through which the water ran. The curtain was sustained from the rod above at the entrance to the shower. That was one of the purposes of the rod. The witness thought that one of the uses for which this rod was intended was for the purpose of catching hold of by a person entering the showerbath. The purpose of the pipes was the conveyance of water into the shower, but they could be used for the purpose of being got hold of by anyone entering the bath. The witness said he would not want to use the hot one. He also said that he did not know as a matter of fact, and had never heard that a Mr. Stuart of Stockton had been thrown against the hot water pipe and severely burned. He had never received any report of any such accident, and had never heard of it, but had heard that one man, he did not know who he was, but some man at some time, had been burned by coming in contact with the hot pipe. He did not know whether it was this particular bath, and he had never received a report on it. He thought that a person could catch hold of the curtain as a measure of precaution so as to prevent falling. The door knob he would say was about 32 or 34 inches from the floor and was there for the purpose of opening the door and

he did not suppose its primary purpose was that of being got hold of by anyone entering the bath. The curtain rod was generally for the use of running a curtain on it. (Tr., pp. 459-465.)

S. W. Jamieson, a resident of Glendale, California, also testified by deposition for the libellees. He said on direct examination that he was a passenger on the "Great Northern" at the time Mr. Hutchins was hurt and had occasion to use the shower bath on the voyage. The bath-room was off the passageway that runs lengthwise of the ship. There was a door that led into the bath-room, and there was a very high threshhold that you had to step over to get into it. In the bath-room were two shower-baths, some washstands and places for towels, etc. The shower-baths were two compartments about the ordinary size of a showerbath, with overhead showers, curtains, a valve at one side for mixing the water at the proper temperature or turning it on or off, and on the open side there was a sill raised from the main floor of the bath-room approximately five inches. The three walls of the shower were of marble slabs and the bottom was of some sort of tile or chinaware. Between the two shower baths was a door which led into some sort of heating arrangement for the water supply. The light in the bath-room was an overhead light, which, owing to the light colored paint, diffused all over. So far as facilities for taking hold of to prevent slipping or falling, he could not say whether or not there was anything further than the valve on the pipes, that being all he had occasion to use. On going into the bath a person could steady himself by taking hold of the edge of the marble slab at the right hand of the picture. (See Exhibit No. 3, Tr., p. 545.) The witness himself did not slip or fall in using the bath. (Tr., pp. 477-481.)

On cross-examination Mr. Jamieson testified that on that trip he used the shower-bath, as he remembered it, at least three times on the way over, and, as he recollected it, he never had occasion to catch hold of anything on using the shower-bath. The rod referred to was a rod on which the curtain ran that shut in the bath from the room itself, and there was a curtain on the rod. He used the valve in turning on the water. That was the only purpose he used it for, turning on or turning off the water, and changing the temperature. (Tr., pp. 481-483.)

Charles Wall. Chief Officer of the Great Northern, also testified by deposition for the libellees. He stated on direct examination that he knew the condition of the shower-bath on the "C" deck on February 18, 1916. He described the shower-bath substantially as shown by the photographs. It would be practical for a person using the bath to hold on to the door knob if he desired to do so, and it would be possible to hold on to the edge of the marble slab. He thought that nine men out of ten, upon stepping into the shower would do that without any conscious effort. The water pipes he said were about five feet high from the floor and quite easy to be taken hold of in entering the bath. In the case of a man losing his balance he thought it would be the first thing he would catch hold of with his left hand. There was no rubber mat on the bottom of the shower-bath so far as he saw. He did not know of a rubber mat ever being used in those shower baths. He had never found anything wrong with this bath, never had made any report concerning it, and never had noticed anything that led him to think that the bath was dangerous in any respect. (Tr., pp. 483-487.)

On cross-examination this witness said that he had no duties outside of inspection with reference to the bath-rooms. He made an inspection on February 18th. He remembered that positively, because it was done every day. He remembered doing it particularly on that day. He took a look in the shower-bath; opened the door and looked in. He might have talked this matter over with the Captain at different times; he remembered that he had. A person holding on to the slab would have to extend his fingers on one side and his thumb on the other, and he could not very well get a grip on any place on the slab. If his foot should slip out from under him and he should fall backwards, his hand might slide right off the slab, although the witness thought he could hold on. The slab was of smooth marble. If a person falling should catch hold of the hot water pipe, the witness imagined it would scald and burn his hands, although in standing on the outside and stepping in the witness said it would be natural to catch the first pipe at hand. The three pipes were close against the wall, but there was space enough to get your hand in and around one pipe. The witness's idea was that if a person stepping into the bath should lose his balance and fall over backwards he could reach out and catch hold of the pipe. The pipes were probably about 12 to 15 inches from the edge of the slab. The door knob might save a person losing his balance, by grabbing it. It might turn, the witness did not know, that was a possibility. (Tr., pp. 489-493.)

W. B. Lowenthal, called on behalf of the libellees, testified by deposition, and said on cross-examination that he was a passenger on the "Great Northern" on its vovage from San Francisco to Honolulu, commencing February 14, 1916. He used the public showerbath of the "C" deck every morning, and had no difficulty. He thought the marble slab would assist a person in supporting himself, but did not think that the water pipes would be of any advantage. He had occasion to hold on to the rod upon which the curtain hung. (Tr., pp. 492-502.) On cross-examination he said that the slab he spoke of formed one side of the shower-bath, and a person could only lay his hand along the slab with his fingers on one side and his thumb on the other, and that there was no way of getting a grip on the slab. If a person entering the bath should lay his hand along the slab and fall off backwards his hand would probably slip off of the smooth surface of the slab. He thought that it would be the natural and only thing that could happen because there was no grip there to hold on to. The witness did not hold on to the pipes in the bathroom at all. (Tr., pp. 502, 503.)

Sam B. Stoy, of San Francisco, testifying by deposition, said that on the trip in question he was a passenger

on the vessel and used the shower baths every day, sometimes twice a day. He said he had no difficulty with the equipment. His memory was that there was a sort of bowl to stand in of porcelain at the bottom, and when he took his shower in case the ship lurched he took hold of the pole on which the curtain was suspended, or the faucet, or a handle, as he remembered it, that was in the back of the bath compartment. He did not recall any difficulty experienced by him in taking a shower bath on February 18th, 1916. (Tr., pp. 533, 534.)

The witness, Barney R. Simons, a dentist of Philadelphia, whose testimony has already been referred to on another point, testifying by deposition, on direct examination said that he had practiced his profession as a dentist for 24 years. He had taken a preparatory course of medicine, but had never completed it. He described the shower bath and basin about as the other witnesses did. (Tr., pp. 562-566.) He said that he had occasion to investigate showers and porcelain basins of that type because he intended to put them in his cottage in Massachusetts. The shower, as constructed on the "Great Northern" was the stock basin in every particular. He would say that the slope was only such as would carry and drain off the water. The floor of the bathroom was made of small tile blocks, and he would say it was in good repair. He used the shower himself for two or three mornings prior to the accident and saw nothing wrong with the shower or the basin or the floor. It struck him as an admirable shower. The place was well lit up. He

should say the room was clean and he saw no evidence of any soap used. The floor between the passage of the two showers was wet as a result of people stepping out from under the shower with the water dripping from their persons, but he would not call that dirty. So far as he knew the place was clean. The tile floor gwas not covered with a rubber mat. He said that he had hospital and medical experience and was familiar with principles of sanitation, and that he had considered and studied carefully matters of infection or sanitation. He regarded principles of sanitation as more important on a steamship than he would in his home, because of peculiar conditions. He had traveled on a great many steamers but he did not remember seeing rubber mats on any of them, and did not remember hearing of anyone falling in the bath. He did not regard the use of rubber mats on the floor of a bathroom on a steamship such as the "Great Northern" as sanitary as a tile floor. He said he should say that if there were mats of a good size in proportion to the size of the room they would help considerably, but smaller mats would provide practically no protection. He regarded the equipment of the shower bath room on the "Great Northern", including its basins and general appurtenances, as first class. (Tr., pp. 566-573.) Shortly after the accident of Mr. Hutchins he took a bath himself and did not find anything unusual about it, except that it was rough and he had to be careful. In his opinion, there was no more slope in the basin than was reasonably neceseary for drainage, and, in his opinion, the general conditions of the showers and of the bath room were reasonably safe. (Tr., pp. 579-581.)

On cross-examination Mr. Simons testified that the basin had a glazed porcelain surface, and the flooring in the passageway was glazed tile. (Tr., p. 581.) Although he testified on direct examination that he had never seen rubber mats, he qualified this on crossexamination by saying that he had seen rubber mats in bathrooms on ships, but did not know that he remembered seeing on first-class steamers, such as the "Great Northern," bathrooms tiled in rubber tile. The rear wall of the bathroom in question was of polished marble. As to the rubber curtains they would not have saved Mr. Hutchins even if he had grasped them. (Tr., pp. 582-583.) As to the use of rubber mats, where, on shipboard, rough weather was to be expected, the question of safety would be more important than the question of sanitation. The presence or absence of a handle was absolutely immaterial as this accident happened, as Mr. Hutchins never could have reached it if it had been there. (Tr., pp. 586-587.) On redirect examination the witness said that there was no rubber mat in the small hallway between the two showers, no rubber mat in the shower bath, and no rubber mat in any part of the lobby. (Tr., p. 589.)

The testimony of Mr. Simons as to the manner in which the shower bath was constructed and equipped did not vary from the rest of the testimony in the case upon these points. His opinions were not based upon any particular expert knowledge, but were only such as any person who has traveled on vessels and

who has been in the habit of using the baths provided, might give. Even though this witness testified more favorably for the libellees than any other witness in the case, except, of course, the officers of the ship, the impression left after reading the whole of his evidence is that the shower bath was slippery and dangerous, and that the highest degree of care had not been exercised in attempting to make it safe.

The libellant in rebuttal called Alfred Hackett. On direct-examination Mr. Hackett testified that he was chief steward of the steamship "Sierra" of the Oceanic Steamship Company, plying between San Francisco and Sydney, Australia, via Honolulu. had been thirty years with the Oceanic Steamship Company, and during that period had occupied the positions of storekeeper, second steward and chief steward, having been chief steward for 18 or 19 years. He was familiar with the internal arrangements of the vessels of the Oceanic Steamship Company with reference to bathing facilities for passengers. For eight years he had been a steward on board the steamship "Sonoma," and had also been on the steamships "Alameda" and "Australia." In referring to the steamers of the Oceanic line that were equipped with shower baths the witness said that the shower baths were about 36 inches square, of marble, and enclosed with a wooden latticed door. There was a wooden grating on the bottom to protect passengers from slipping, and outside in the recess mats or bath towels were also put for the safety of the passengers to stop them from slipping. The bath-rooms had rails which

passengers could hang on and always a bath mat or a wooden grating to protect them so that they would not slip. The same precautions were used in all the bathrooms. (Tr., pp. 345-348.) Two of the vessels of the Oceanic line were so equipped with shower rooms, the "Sierra" and the "Sonoma." These were the vessels where he had observed shower bath construction because he had charge of them. He was superintendent of that department, and that came to him naturally in the steward's department. The "Ventura" was a sister ship in all respects to the "Sierra" and "Sonoma," and he had also been aboard the "Ventura." In the other vessels referred to by him the shower was over the ordinary white procelain tub. He knew that everything was satisfactory so far as his ships were concerned. There had never been any question or trouble. (Tr., pp. 348-352.) Upon examining the photographs, Claimant's Exhibits Nos. 1, 2 and 3 (Tr., pp. 543-545), the witness said that the shower baths on the vessels of the Oceanic line were a facsimile, the only difference being provisions for the safety of the passengers. On the Oceanic vessels a wooden grating was kept on top of the marble and on the outside in the partition a wooden grating was also kept and there was a bath towel put so that a passenger stepping out from the bath into the dressing compartment would not be liable to slip. There was a handle to hold on to right in the bath, outside the bath-room, where one comes out from the shower, and there was a lattice door, which made it impossible for the passenger in case of bad weather, to be thrown

out of the bath-room. The witness said that in his opinion and experience a bath of the description shown by the photographs without any protection for a passenger, that is, without any wood grating or a foot bath towel to stand on, renders a passenger liable to slip. There was evidently no handle or anything a passenger could get hold of according to the photographs. His company protected their passengers by having a wooden grating bath mat, and also on the outside dressing room a platform of wood with a bath towel on it to prevent the passenger from slipping while he was wiping himself and dressing. The bathroom, as represented by, and in the condition shown by the photographs, was certainly not safe. (Tr., pp. 354-357.)

On cross-examination Mr. Hackett said that these wooden gratings had been used on the floors ever since he knew the Oceanic Steamship Company. He did not know of any time when passengers used those shower baths without this grating or flooring. There was a man kept to look after that and he was cautioned to keep them in their places. These gratings were always down. In response to a question by the Court Mr. Hackett said that the wooden grating fitted in the basin and was there for the safety of the passenger. The basin was of marble and sometimes if a person put his foot in salt water he would slip. It could not be helped, particularly in bad weather. They also had on the Oceanic vessels named a wooden door that closed and protected the passenger from falling out in case the ship pitched. When the

passenger stepped from the basin into the dressing room there was another long grating, and on that grating was a bath towel or a bath mat to prevent him from slipping. Their bath room floors were of marble also, and that was the reason these things were used. These devices had been on the vessel 16 years. (Tr., pp. 357-359.)

This witness's testimony shows that on vessels of the Oceanic Steamship Company, on the same run as the "Great Northern," that is, between San Francisco and Honolulu, where the shower bath arrangement was practically the same as on the "Great Northern," gratings were provided in the basin itself and upon the floor of the compartment outside of the basin, that the bathrooms had rails which the passengers could hang on to, and that there was a lattice door that would prevent a passenger from falling out of the compartment in case he slipped. Had there been such a railing on the shower bath of the "Great Northern," or had the basin or flooring been equipped with gratings or mats, the accident in all probability never would have happened. Had there been a latticed door that could have been closed as soon as Mr. Hutchins entered the compartment, he could not have fallen, as it is shown he did in this case, clear across the passage way into the shower bath compartment on the other side. Yet, in spite of these facts, the libellees contend they used the highest degree of care and constructed and equipped their shower baths in a careful manner and without negligence.

Considering all of the evidence in the case relative to the general construction and equipment of the bathroom, including the photographs, having in mind the glazed porcelain surface of the basin, the smooth, polished marble slabs at the side, the glazed tile floor, the lack of rails, the lack of a latticed door, and the lack of mats of rubber or other material that would give a foothold, the conclusion that the shower bath was dangerous conforms with the weight of the evidence, and the absurd opinions of the officers, under the circumstances, that Mr. Hutchins might have saved himself by grasping a curtain rod over six feet high and behind him, or by grasping the pipes on the marble slab, one of which carried hot water and all of which were close to the slab, or by grasping the highly polished marble slab at his right, do not weaken this conclusion. None of these instrumentalities were constructed for any such purpose and no one but an interested witness would make the claims for them and suggest the uses that the officers of the ship who testified in this case did. Viewing the evidence as a whole the appellees not only have not sustained the burden, placed upon them by the law, of showing that they exercised a high degree of care and furnished a safe shower bath for the use of the passengers, but the evidence affirmatively shows that they did not.

The Court, in its opinion, found that there was no mat of any kind on the bottom of the basin in which it was necessary to stand in order to take a shower bath, nothing but the bottom of the basin itself. The Court also held that there was a sharp conflict in the evidence as to whether the placing of a mat or anything else over the bottom of the basin would have

added anything towards making it less slippery or rendering it less likely that one using the place to take a bath would fall on account of the bottom being slippery. (Tr., p. 658.) The Court is entirely wrong in this conclusion. There is no such sharp conflict in the evidence and even the libellees' witness Simons admitted that a mat would have rendered the shower bath less dangerous. Only one witness on behalf of the libellees, the captain of the ship, testified in substance that, in his opinion, rubber or wooden mats would be more slippery than the glazed porcelain bowls. The Court below entirely ignored the testimony of the one disinterested witness, who was qualified to speak on the subject, namely, Chief Steward Hackett, of the steamship "Sierra," whose testimony is referred to above.

The lower court seemed to have been carried away with the ideas of the officers of the ship that all a person had to do to be entirely safe was either to hold to the curtain rod, or the polished marble slab, or the small handle at the rear of the bathroom (Tr., p. 660), and disregarded all the other evidence in the case.

As a great deal of the evidence was by deposition the findings and conclusions of the lower court are not in any manner binding upon this appeal, and this court is warranted, under the authorities referred to later, in reviewing the evidence and in forming its own conclusions and opinions uninfluenced by the conclusions of the trial judge. (b) As to Whether the Bath Was Equipped With a Handle.

A great deal of the testimony in the case was directed to the question as to whether at the time of the accident the shower bath was equipped with a small handle that appears in the center of the photographs, Claimant's Exhibits Nos. 2 and 3 (Tr., pp. 544-545). Upon this point there really was a sharp conflict in the testimony. Assuming that the handle was there, which was the assumption indulged in by Mr. Hackett in his testimony, the great weight of the evidence still shows that the libellees did not exercise the degree of care required of them by the law in constructing and equipping their shower baths. If, as a matter of fact, the handle was not there at the time of the accident, it merely indicates on the part of the libellees still greater negligence. The handle was not there at the time the vessel was built, and was added either shortly before or shortly after the accident occurred

Mr. Hutchins, the libellant, testified on direct-examination, that the handle was not there when he was injured. (Tr., pp. 76-77, 79.) Subsequent to the time of the accident, and about the middle of March, after the "Great Northern" had made another trip to Honolulu, he went on board the vessel and visited the bathroom. At that time there was no handle or projection there. He was positive of that. On the next trip of the vessel to Honolulu Mr. Hutchins also looked at the bathroom in company with one of the stewards of the vessel, Lefebre by name, and on

this occasion there was no handle there. (Tr., pp. 96-97.)

On cross-examination Mr. Hutchins said that he saw the bathroom three times after the accident. The first time was while he was on the ship, and that was out of curiosity; the next time was because he had complained to Mr. Stone, the chief agent of the company, who was on board, that he was maintaining a death trap, and when the ship came back again he went in to see whether it had been changed or not, and when he went the third time it was also for that purpose. Up to the time of the third inspection there was no handle there. (Tr., pp. 127-128.) The handle was not there at the time he fell, it was not there at the time of his second visit, and it was not there at the time of the third visit. That is the absolute, positive statement of Mr. Hutchins. (Tr., pp. 165-166.)

The witness, Francis G. Lefebre, who was employed on the steamship "Great Northern" at the time of the accident, as a waiter, and who worked at the chief engineer's table, for Mr. Morris, remembered the occasion of the accident to Mr. Hutchins and testified on behalf of the libellant. On direct-examination he said that on the occasion of the next trip of the vessel to Honolulu Mr. Hutchins came aboard the steamship and that he, Lefebre, accompanied Mr. Hutchins to the bathroom where the accident happened at Mr. Hutchins' request. At that time there was no handle on the back wall of the shower bath. On the same day, and right after that he went to the chief engineer's room (Mr. Morris) and told him that Mr. Hutchins had come down to the boat. Morris

asked what for, to which Lefebre replied: "He wants to see the shower bath, to see for himself that there was no handle." Mr. Morris said: "There must be one," and Lefebre replied: "Mr. Morris, Mr. Hutchins and I just looked and we did not see any." Mr. Morris again said: "There must be one." Lefebre said: "If you don't believe me, come and see." Morris then went with Lefebre to the bathroom and Lefebre showed him that there was no handle there. (Tr., pp. 594-598.)

On cross-examination Mr. Lefebre testified that he had been asked to testify in the case by Mr. Hutchins and that he phoned Mr. Morris (the chief engineer of the vessel) that he was going to testify. Morris said to him: "It is up to you, but I hope you will only tell the truth." Lefebre replied: "Certainly, Mr. Morris, I will tell the truth." Morris then said: "You know very well the handles were there four months before the accident happened." Lefebre replied: "Mr. Morris, I give you my word that the handles were not there, for Mr. Hutchins and I went into the shower bath and looked for them." (Tr., pp. 601-602.)

On redirect-examination Lefebre said that Morris told him that if he testified that way it might drive him to jail (Tr., p. 604), and on recross-examination said that Morris said to him: "Francis, it is up to you, if you go up in this case you may get yourself in trouble." (Tr., pp. 604-605.)

H. E. Westcott, purchasing agent for the City and County of Honolulu, who testified for the libellant, said that the latter part of March, 1916, he visited the bathrooms on board the steamship "Great Northern" in company with Mr. Bicknell, the City and County Auditor. From information he had received, he took the opportunity and pains to see whether or not the handle was in the bathroom where Mr. Hutchins sustained his injury. The handle was not there at the time of his visit. (Tr., pp. 204-207, 208-212, 261.)

W. H. Metzler, special agent of the Great Northern Pacific Steamship Company, on the other hand, testifying for the libellees, said that on the day of the accident he visited the shower baths on the "Great Northern" and that the "grab irons," as he called them, were then in each compartment. (Tr., p. 212.) He went to the bathrooms for the purpose of examining the equipment to see if there were any defects. He said that it was his duty to investigate all personal injuries and accidents. He did not know the exact date when the "grab handles" were put in the shower compartments, but, as he remembered it, it was two trips before the one Mr. Hutchins made. (Tr., pp. 212-217.)

On cross-examination Mr. Metzler said that on the day of the accident, and after it happened, he did not remember saying anything to the captain about the grab handles. Upon his attention being called to his deposition that had previously been taken, in which he had answered: "The captain and I talked it over that day—the day of the accident," he said: "I think we did; yes, we both talked about the grab irons, on the same day the accident occurred." (Tr., pp. 217-219.) On cross-examination Mr. Metzler was also

asked whether he knew a man by the name of Lefebre, and at first he said he did not, and never did know him that he recollected. He was then shown his own card containing the words: "W. P. Metzler, Pier No. 7, Frisco, Cal., Special Agent," having on the reverse side the words, "Please call at my office as soon as possible" (Tr., p. 50), and was asked whether he left that card for Lefebre. He said: "Yes" he did, and that Lefebre was a steward on the boat. He left the card at the Oakland Hotel, asking Lefebre to call at the office so that he might question him regarding the accident. He understood that Lefebre would testify that there was no grab iron in the shower. (Tr., pp. 219-221.) Mr. Metzler had been in the employ of the Great Northern Pacific Steamship Company since January, 1914. He judged the grab irons to be about four and a half or five feet from the floor. He had no idea when the photographs were taken and did not know that they were not taken until after the accident. (Tr., pp. 227-228.)

J. B. Morris, chief engineer of the "Great Northern," also testified for the libellees relative to the handle. The grab iron was in the shower bath on the day that Mr. Hutchins sustained his accident. He took a look at it the following morning. He had been told by Mr. Hutchins the evening before that he had slipped and hurt his shoulder, and he just took a look at the place. He knew there were handles there. Upon being asked whether he looked for them at that time he said it was not necessary to look at them, because they had been put in some time before. They

were put in there on the 24th of January, and that matter was fixed in his mind in looking up the bills afterwards, as he remembered it. (Tr., pp. 240-243.) He did not at any time, in Honolulu, or elsewhere, go with Lafebre to the shower room for the purpose of ascertaining whether or not any handles were there, or have any conversation with Lefebre about that matter. (Tr., pp. 250, 304-305.) Mr. Morris further testified that shortly before Lefebre testified in the case in October, 1916, Lefebre called him up by telephone and told him that Mr. Hutchins had gotten him a position at Del Monte during the summer and had asked him to testify as to showing Mr. Hutchins the shower on the "Great Northern." Lefebre also said that he had always liked Morris and would not want to testify in any way to hurt him. Morris asked how that was going to hurt. Lefebre replied that the way he was to testify was that he took Morris to the shower and showed him there were no grab handles there and said he did not like to do that. Morris told him that whatever he did to testify to the truth and that if he didn't he was liable to go to jail for it. Mr. Morris also denied that the conversation between himself and Lefebre was such as Lefebre had testified to. (Tr., pp. 304-308.) Further, Mr. Morris testified that he knew the shower bath grab iron handles were put on the "Great Northern" about January 24th, 1916, from the office files of the marine superintendent, and that he knew it was before Mr. Hutchins' trip by the files in the office. Upon being further examined by counsel for the libellees, and upon being asked a direct question, he said that on that trip he observed that the handles were in their places. (Tr., pp. 309-310.)

On cross-examination Mr. Morris testified that he did not know whether Mr. Hutchins was aboard the "Great Northern" in April of 1016, and did not remember whether Lefebre was on board the vessel about that time. He was not sure whether Lefebre was his steward at that time, but did remember that he did not have such a conversation as Lefebre testified to. He did not know who his steward was in April, 1916, when the steamship was in Honolulu. (Tr., pp. 314-315.) In the ordinary bathtub where there is a shower over it, the handles are on the side of the wall, and some of them are a foot long, sometimes made of wood and sometimes of brass and plated. They project about two and a half inches. The handle in the shower room of the "Great Northern" he should say was about five inches long. (Tr., pp. 315-316.)

A. Ahman, master of the steamship "Great Northern," testifying on behalf of the libellees, said, in describing the shower bath, that directly on the wall was a grab handle or grab iron at the time Mr. Hutchins fell. He fixed this from the fact that one of the small tables from the veranda pulled loose from the deck and he had requisitioned to have it properly fixed in San Francisco that voyage, which was the beginning of January, and also requisitioned for some other alterations and repairs on the boat. Simon was doing the work and as the captain was passing the

bath-room with Simon, Simon said he had a man working to put up grab irons, so the captain went in there and saw a man putting them up. This was on the first trip after New Years. Mr. Ahman did not exactly recollect when this was, but knew it was the Christmas trip when the table was fastened, and the grab irons were put in at the same time, because Mr. Simon called his attention to it. He thought this must have been one or two trips before Mr. Hutchins was a passenger. The grab irons were not on the boat originally, as she came from the shipbuilders, but they were put on in San Francisco. He did not know when the photographs in evidence were taken. He was not in the particular shower bath where Mr. Hutchins met with his accident, on the morning of February 18th, 1916, or the night before, or two days before. He did not know whether he was there at all on that particular trip. (Tr., pp. 270-273, 281.)

It is clear from this evidence that Captain Ahman has no independent recollection as to the time when the handles were placed in the shower baths, but only knows that they were placed there at the time the workman was putting them on, whenever that was.

Joseph Gould, also called on behalf of the libellees, testified on direct-examination that he was a steward on the "Great Northern" at the time Mr. Hutchins was a passenger and that he was acquainted with the shower bath. The photographs, Claimant's Exhibits Nos. 1, 2 and 3 (Tr., pp. 543-545), correctly represented the shower room on "C" deck, as it was during Mr. Hutchins' trip. The handle was in the shower

room at that time. He saw it himself. (Tr., pp. 292-293.) In attempting to explain why he knew this, the witness was not very clear. (Tr., pp. 293-294.) All he appeared to know was that at some time he had seen a man drilling the holes for handles on "B" deck, and that he went to "C" deck where the shower bath in question was, to see if his mate was ready for sea, and his mate's were all finished up, and Gould's were not put on until the following day.

On cross-examination Joseph Gould said that he was not in the particular shower bath either on the morning of February 18th, 1916, or on the morning of the 19th, or on the 20th, or on the 21st. He did not know when the photographs were taken. It was either in April or May, 1916, somewhere around there. After the accident and after the ship had been taken off the run he had a conversation with Mr. Relf, the claim agent, about this particular shower bath on Deck "C," at Portland, Oregon. That was sometime in May, 1916. The witness himself had charge of the showers on "B" deck. (Tr., pp. 295-298.)

Thomas S. Mills, the chief steward of the "Great Northern," testified for the libellees, and on direct-examination said that he had been holding such position since August 10th, 1915. He personally knew the shower compartment on "C" deck of the "Great Northern" and identified the photographs introduced in evidence. He knew the handle was in the compartment before the ship sailed on which Mr. Hutchins was a passenger. He had the requisitions for it, checked the articles up before they sailed, and in-

on. The requisition was put in on the 20th of January, 1916, and the handles were finished on the morning of the 25th. He saw the work being done. After the work was done a bill was rendered that the witness O. K.'d. (Tr., pp. 324-328.) The requisition and bill were introduced in evidence and marked Libellees Exhibit 1 (Tr., pp. 50-62).

It is apparent that the witness Mills depended largely upon his requisitions and the bills rendered, in giving his testimony. The requisition for "Grab bars in all shower baths," dated January 20th, 1916, is found on page 59 of the Transcript. The item "10 nickel plated pulls, \$7.10," on page 55 of the Transcript, is the charge for the handles. (Tr., p. 328.) This charge does not indicate where the pulls were used. The statement "Grab bars in all shower baths" on page 53 of the Transcript appears to be merely a repetition in the bill of Muir and Symon of the language of the requisition, and does not throw any light upon the question as to whether a hand grab was actually fastened in the shower bath in question.

On cross-examination Mr. Mills testified that he was in the shower bath compartment where the accident happened to Mr. Hutchins on the morning of February 18th, at about 11:00 o'clock for inspection. There were six public shower bath compartments on the ship. These were all inspected, as well as the baths in the second cabin. The inspection was made with the captain. Not much time was spent going through the whole ship and the inspectors did not lie

on the job. A regular morning inspection was made on the steamship "Great Northern" by the captain and the witness Mills, of the whole ship—of the saloon, the bath places, and the staterooms; such inspection might take twenty minutes or it might take forty minutes. The witness said that he went to these baths six or seven times a day to make inspections, but that he might have been in this particular bath-room only three times on February 18th, 1916. Tr., pp. 328-331.)

Dr. Robert J. McAdory, who was the ship's surgeon at the time of the accident, also testified on behalf of the libellees concerning the handle. He said on direct-examination that the grab handle was there on that day. (Tr., p. 383.) On cross-examination he said that he would not undertake to swear that he saw the handle in the back of the bath on the morning of the injury. He said, however, that he examined it the same day, but he did not know what time, and that nobody was with him. He examined it, he said, to see if there was any way by which Mr. Hutchins could have supported himself. Upon being asked how long he was in making that examination, he said that a glance was all that was necessary; that he went in and looked at the compartment. It was just a matter of a glance. (Tr., pp. 392, 393, 397.)

Walter A. Scott, the photographer who made Claimant's Exhibits 1, 2 and 3 (Tr., pp. 543-545), said that these photographs were taken on May 1st, 1916, and that they correctly represented the bathroom in question at that time. (Tr., pp. 430-432.)

S. W. Jamieson, a resident of Glendale, California, also testified on behalf of the libellees. It does not appear he was in any way connected with the vessel either as an officer or otherwise. He was a passenger on the "Great Northern" at the time Mr. Hutchins was hurt, and he stated on direct-examination that he could not state whether there was any facility for taking hold of to prevent slipping in the bathroom in question other than the valve. (Tr., pp. 477-479.)

On cross-examination he said that he did not notice the handle that was shown on the photograph at all, and could not say whether it was or was not there at the time of the accident. He did not particularly notice it. He did not notice that handle either on the trip going or on the trip returning. He used the shower bath about three times on the trip down and also used it on the return trip. (Tr., pp. 481-483.)

This testimony shows either one of two things: that the handle was not there at the time of the accident, which theory conforms to the great weight of the evidence of all of the disinterested witnesses in the case, or, if it was there, it was so inconspicuous as to be valueless in case of emergency.

Charles Wall, chief officer of the "Great Northern," called by the libellees, on direct-examination, and testifying with reference to the photographs, stated that in February, 1916, the handle, as shown on the photographs, was in the shower bath. The handle was made of heavy bronze or brass, and fastened on to the rear marble slab with heavy screws. (Tr., pp. 485-486.) On cross-examination he said that he had

never told anybody the handle was there on February 18th, 1916, before he heard of this case. It was there, he said, the day before the accident.

The record is absolutely silent as to how this witness could have had impressed upon his mind such a minor fact as a handle being in a particular bath-room on a particular day.

W. B. Lowenthal, also a witness for the libellees, said on direct-examination that he was a resident of San Francisco and engaged in the grain and bean business. He was a passenger on the "Great Northern" from San Franciso to Honolulu on the trip commencing February 14th, 1916, and had occasion every morning to use the public shower bath on the "C" deck. He said that to the best of his knowledge there was no rod or bar to hold on to in the shower. There was just the three walls and a curtain in front, and he did not remember any hand hold on the marble slab at the back of the bath. (Tr., pp. 498-499.)

On cross-examination Mr. Lowenthal said that to the best of his recollection there was no hand grab or hold at the rear of the bath-room that he saw, and on recross-examination said that while in the bath he worked the handle on the pipe to turn on the water and should think he had an opportunity of observing all of the interior fittings of the shower bath. (Tr., pp. 503-504.)

Here is another disinterested witness wholly unconnected with the steamship Company, called on behalf of the libellees, whose testimony corroborates all of the testimony of the libellant and his witnesses to the effect that there was no handle in the bath-room at the time of the accident.

William John Tomlin, also called on behalf of the libellees, testified on direct-examination, by deposition, that he was a shipfitter, connected with the firm of Muir & Symon, who were in the business of shipfitting, ship-repairing and machine work. He stated that he put on the handles in the shower bath shown on the photographs, Claimant's Exhibits 1, 2 and 3 (Tr., pp. 543-545). By referring to his time cards he could tell the date. The entries on the time cards were in his own handwriting. The dates were January 24th and 25th, 1916. (Tr., pp. 512-515.) These time cards were introduced in evidence and marked "Claimant's Exhibits 5 and 6." (Tr., p. 548.)

On cross-examination Mr. Tomlin testified that he had a recollection of doing the work. He thought he did it on both ships, the "Great Northern" and the "Northern Pacific" too. He was pretty sure he did them all on the "Great Northern." He could not tell exactly the number of handles he put on the showers. He thought it was just putting on the handles on all the showers. The letters on the card "G. N. S. S." meant "Great Northern Steamship," and "N. P. S. S.," "Northern Pacific Steamship," but he said the letters "N. P. S. S." under the words "Drilling marble in shower baths, using electric drill four hours," meant the Northern Pacific Steamship Company, but the steamship was the "Great Northern." He did not know why he had the letters "N. P. S. S.," which would be the "Northern Pacific Steamship," under-

neath. There must have been an error in putting down the name of the ship. According to that record he drilled the holes in the marble on the "Northern Pacific Steamship." He put grab irons on the "Northern Pacific Steamship," he said, but not on that date, because there must have been about a month elapsed. The "Great Northern" had them on first. because she was going to Honolulu. According to the record, however, he said he put a baker's oven (see Claimant's Exhibit No. 5, Tr., p. 548) on the "Northern Pacific" that same day. He would not say that was a mistake. The letters "N. P. S. S." on the Exhibit were not in his handwriting. The letters "G. N. S. S." on Exhibit 5 were not in his handwriting. He did not put them down at all. That had been added. He had no independent recollection of the day on which he did the work on the "Great Northern" except as he gathered it from the time cards (Tr., pp. 515-519.)

On redirect-examination Mr. Tomlin said, as to the size of the handles, that inside they were about six inches, and about nine inches over all. The middle was about an inch and a quarter wide by three-eighths of an inch thick. On recross-examination he said that the handles were put on the "Great Northern" before they were put on the "Northern Pacific," because he put them on the "Great Northern" before she went to Honolulu, and put on the others probably a month later. He would not say he put the handles on the "Great Northern" the first or second trip, he did not know the dates of sailing, but he knew they were not

on the first trip. He did not know when her first trip was and did not know when her second or third trips were, and could not say what trips she made, but he put on the handles. He put them on when she came back one trip from Honolulu. She must have made one trip previous to that. The baths were identical on the "Great Northern" and on the "Northern Pacific," and he could not tell from the photographs in evidence whether they represented the shower baths of the "Great Northern" or the shower baths of the "Northern Pacific." (Tr., pp. 519-523.)

It is clear that this witness relied entirely upon his time cards and had no independent recollection of having put on the handle in the bathroom in question. Exhibit 5 itself shows that the work on the baker's oven on January 24th, 1916, was on the "Northern Pacific" and not on the "Great Northern," and the letters "N. P. S. S." under the item of drilling marble in shower baths, the witness said meant "Northern Pacific Steamship" and that letters "G. N. S. S." meant "Great Northern Steamship." The witness first said that all of the entries on the time card were in his own handwriting, but on cross-examination had to admit that these letters had been added by someone else. The Court below laid great stress upon the evidence of this witness, but the facts show that he was probably mistaken, and point strongly to the work having been done on the "Northern Pacific" and not on the "Great Northern."

J. B. Switzer, a shipfitter and foreman employed by Muir & Symon, testifying on behalf of the libellees, said that in January, 1916, he was the outside foreman of that firm. He said that he received a requisition from Mr. Muir, went down to the boat to see what was wanted, ordered the handles made at the foundry, and instructed Mr. Tomlin to drill the holes and have everything ready so that when the handles came they could be put on. He could not give the date any more than January, outside of what the time cards showed. He was sure it was January on account of the dates of the time cards and the dates of the requisitions. He also testified as to the size of the handles, corroborating in this regard the former witness, Tomlin. (Tr., pp. 523-525.)

On cross-examination Mr. Switzer said that the first he heard about these handles after they were put on was about three months before he testified (July 31st, 1916), and that he had talked the matter over with Mr. Relf. He had no independent recollection of the matter at all as to the time and went merely by the time cards. He relied on the time cards for the date. He had a requisition for the same work on the "Northern Pacific" and put in the handles there but had no recollection of the time he ordered those handles made. He believed the "Great Northern" was lying at Pier 25 and the "Northern Pacific" at Pier 11 or 9, he could not say which. (Tr., pp. 525-527.)

Katie Schneider, also testifying for the libellees by deposition, merely stated that she was bookkeeper for the firm of Muir & Symon during January, 1916, and made up the bills from the time cards handed in. She said that the letters "G. N. S. S." and "N. P. S. S." on the time cards, Claimant's Exhibits 5 and 6 (Tr., p.

46), were in the handwriting of W. J. Tomlin, although Mr. Tomlin said that these letters had been added by someone else, and were not in his handwriting. She said that the letters "N. P. S. S." were a mistake because the work was done on the "Great Northern." She, however, could have had no independent knowledge as to where the work was done, although she tries to identify it by reference to a contract number. (Tr., pp. 527-531.) In connection with her evidence the voucher, Claimant's Exhibit No. 7 (Tr., p. 549), was received in evidence, but this voucher was made up from the time cards.

On cross-examination Katie Schneider said that she was familiar with the handwriting of Mr. Tomlin and was certain that the letters on Claimant's Exhibit No. 5, "G. N. S. S." and "N. P. S. S." were in his handwriting, and that if Tomlin testified that they were not he was absolutely mistaken. (Tr., pp. 531-533.)

Samuel Symon, vice-president and general manager of the firm of Muir & Symon, also testified for the libellees in connection with the handles, but his whole testimony was based upon the time cards, requisitions and vouchers. (Tr., pp. 536-542.)

It is not strange that the witnesses who claimed to have furnished the handles, put them on, and kept the accounts concerning them, had to depend entirely upon the book entries and time cards. They could not be expected to have an independent recollection concerning the placing of a small handle in a single shower compartment several months prior to the time of testifying. The testimony for that reason is of little

weight, and this is particularly so because of its confusing and conflicting nature.

Sam B. Stoy, the manager of the London and Lancashire Fire Insurance Company at San Francisco. and not in any manner connected with the vessel who was called as a witness for the libellees, testified on cross-examination that the claims agent of the steamship company, about a week before Mr. Stoy testified, on July 31st, 1916, showed him a photograph of the shower bath of the "Great Northern." That photograph showed a handle affixed to the wall in the back part of the shower, and Mr. Stov thought he mentioned that fact, or asked the question if it was there at the time he was on the trip when Mr. Hutchins was injured, because his memory was not clear as to that, as it was his habit when the ship lurched a little to reach up, as he was very tall, and grab the curtain pole. (Tr., pp. 535-536.)

All of the disinterested witnesses in the case either swear positively that the handle was not in place at the time of the accident or express doubt as to its being there.

Barney R. Simons, the dentist of Philadelphia, an apparently disinterested witness, who testified on behalf of the libellees, and who was a passenger at the time Mr. Hutchins was injured, on direct-examination also said that he did not remember seeing any handle in the shower and he did not think there was one there. There might have been, but he did not remember seeing it. (Tr., pp. 577-578.) On cross-examination Mr. Simons was more positive, and said

there was no handle there (Tr., p. 582), and further (Tr., p. 584), that he did not recall seeing any handle there.

The court below laid great stress upon the fact that the officers of the ship swore that the handle was there at the time of the accident and still greater stress upon the time cards, requisitions and accounts and the evidence of Mr. Tomlin, Mr. Switzer, Katie Schneider, Chief Steward Mills and Samuel Symon, relating to the same (Tr., pp. 654-656), but, as has been pointed out, all of this evidence depends upon the accuracy of the entries and whether they applied to the "Great Northern," and these questions are left very much in doubt. Furthermore, this evidence has little weight when considering the actual fact involved, namely, whether a handle was in the bathroom in question on the date of the accident. Even if there had been no confusion in the accounts, it is still highly probable, in view of all the other evidence in the case, that through inadvertence a handle had not been placed in the bathroom in question at the time of the accident. The trial judge found that Mr. Sam B. Stoy swore positively that the hand-hold was on the wall of the shower bath compartment at the time Mr. Hutchins fell and was injured. (Tr., pp. 656-657.) As we have just shown, Mr. Stoy gave no such evidence, but, on the contrary, expressed considerable doubt as to whether the handle was there at the time. The court wholly misconceived the effect of Mr. Stoy's testimony.

The trial judge also in his opinion stated that in order to find that the hand-hold was not there it would

be necessary to refuse to believe the positive, affirmative testimony of several disinterested, reputable witnesses, swearing positively that it was there. (Tr., p. 657.)

There is here again a misconception of the evidence. The disinterested witnesses did not swear positively that the handle was there. Some of them swore positively that it was not there, others that they did not see it, and others expressed doubt as to its existence. Mr. Westcott, purchasing agent of the City and County of Honolulu, a wholly disinterested witness, who, after the accident, went on the vessel for the express purpose of ascertaining whether a handle was in the shower bath, says it was not. The witness, Lefebre, says positively it was not. The passenger, Jamieson, says that he did not notice it. The disinterested witness, Lowenthal, says that he did not see a handle there. The disinterested witness Stoy expressed doubt as to whether the handle was there, and Simons, also a passenger, says there was no handle, or at least he did not see it.

All of this evidence, as well as the evidence of the libellant, who, after the accident made three separate trips to the shower bath for the purpose of examining the bathroom, and who says that on neither occasion was the handle there, was absolutely ignored by the court. He preferred rather, to rely upon the evidence of the interested officers of the vessel and the confusing and unsatisfactory documentary evidence made up of the time cards, requisitions and vouchers.

The fact of the existence or non-existence of the

handle in the shower bath at the time of the accident has not the weight that libellees claim for it. If it was there, the evidence is still overwhelming that the shower bath was dangerous, and that the libellees did not exercise that degree of care required of them in equipping it.

As much of the evidence relating to the handle was based on depositions, this Court, under the authorities which we will cite later, is fully warranted in ignoring the findings and conclusions of the court below and in forming its own opinion uninfluenced by the decision in the case.

3. This Court may review all of the evidence and determine the matters of negligence and liability in accordance with its own convictions based on the record.

An appeal in admiralty operates as a new trial and findings of fact, whether by the judge or a jury, are not binding on the appellate Court. Although the findings will not as a general rule be disregarded unless the Court is well satisfied that they are contrary to the evidence, yet the testimony may be weighed and considered by the appellate Court, and such Court may pass upon its inherent probabilities, and make proper allowance for bias, point of view, etc.

The A. G. Brower, 220 Fed. 648, 136 C. C. A. 256;

Munson S. S. Line vs. Miramar S. S. Company, 167 Fed. 960;

Levy vs. The Thomas Melville, 37 Fed. 271;

In the case of *The Columbian* (C. C. A.), 100 Fed. 991, where the cases were distinguished and the decree of the lower Court reversed on the facts, it was held that the Circuit Court of Appeals is not bound by a finding of fact made by the Court below in an admiralty case, but it is its duty, under the statute giving the right of appeal, to determine such question in accordance with the convictions formed from the record by the judges sitting on the appeal.

In The Lucille, 19 Wall. 74, the Supreme Court of the United States, in considering appeals from the District Courts to the Circuit Courts before the establishment of the Circuit Courts of Appeal, held that the judgment of the Court below should be regarded as though it had never been rendered, and that there should be a trial de novo.

See, also, The Hesper, 122 U.S. 226.

Where the testimony of the witnesses in a suit in admiralty is largely taken by deposition, as was the case in the present suit, there is not the same presumption in favor of a finding of fact as when based on the oral testimony of witnesses appearing before the Court, and it will be more readily reversed by the Appellate Court.

The Santa Rita, 176 Fed. 890, 893, 100 C. C. A. 360;

The Sapho, 94 Fed. 545, 36 C. C. A. 395;

The Glendale, 81 Fed. 633, 26 C. C. A. 50;

Hamburg-Amerikanische Paketfahrt Aktien

Gesellschaft vs. Gye, 207 Fed. 247, 124 C. C. A. 517.

The reason of this rule is that where the testimony or a considerable portion of it is not taken in open Court, the Appellate Court has the same opportunity that the Court below had to judge of the value of the testimony. This is the reasoning followed by this Court in the case of *The C. S. Holmes*, 237 Fed. 785, 150 C. C. A. 529.

The decree below will be reversed where the testimony of several witnesses in a position to observe is opposed to the finding of the lower Court (Wells vs. The Ann Caroline, Fed. Cas. 17,389); where the District Judge has rejected the positive testimony of witnesses who were in the best position to know the facts (The Albany, 81 Fed. 966, 27 C. C. A. 28), and even where the trial judge has seen and heard some of the witnesses, especially when his findings, as in the case at bar, have been apparently induced in part by a misplacing of the testimony. (The Gypsum Prince, 67 Fed. 612, 14 C. C. A. 573.)

Where a Court of admiralty omits to find facts which are material to the issues in a case, although they are proved by the evidence, the case is reviewable by an Appellate Court, unaffected by any findings of the trial Court.

The Fullerton, 211 Fed. 833, 128 C. C. A. 359.

The Act of February 16th, 1875, relieving the Supreme Court of the United States of the necessity of deciding questions of fact in admiralty, does not apply to the Circuit Court of Appeals.

The State of California, 49 Fed. 172, 174, 175, 1 C. C. A. (9th Circuit) 224.

The last mentioned case also holds that on an appeal in admiralty the case is tried de novo.

As in the case now before this Court, much of the evidence was by deposition, and as the Court below in material matters made findings either directly contrary to the evidence or without any evidence to support them, this Court is fully warranted under the authorities in ignoring the findings and in drawing its own conclusions based on the record before it.

4. The legal liability of the appellees by reason of the dangerous nature of the shower bath

## (a) The burden of proof and presumptions.

Whatever the rule may be in the State Courts, it seems to be well settled in the Federal Courts, and particularly in admiralty cases, that where the evidence shows the happening of an accident to a passenger which, according to the ordinary course of things would not happen if proper care had been exercised, the presumption is against the carrier, and the burden is on him to relieve himself from it. The rule which requires an employee suing his employer for an injury to allege and prove the negligence upon which the right of recovery is based does not apply to a suit by a passenger against a common carrier, in which case the fact of the injury while the passenger was himself in the exercise of due care raises a presumption of negligence on the part of the carrier, which casts upon it the burden of proving the exercise of proper care,

and that it used all appliances readily obtainable, known to science, for the prevention of accidents.

Whitney vs. N. Y., N. H. & H. R. Co., 102 Fed. 850, 43 C. C. A. 19.

## See also:

Southern Pacific Company vs. Cavin, 144 Fed. 348, 75 C. C. A. 350;

N. Jersey St. Railway Co. vs. Purdy, 142 Fed.

955, 74 C. C. A. 125;

Sprague vs. So. Ry. Co., 92 Fed. 59, 34 C. C. A. 207;

T. and P. Ry. Co. vs. Gardner, 114 Fed. 186,

52 C. C. A. 142;

The New World, 16 How. 469, 14 L. Ed. 1019; The City of Panama, 101 U. S. 453, 25 L. Ed. 1061.

In the case of City and Suburban Ry. Co. vs. Svedborg, 20 App. (D. C.) 543, affirmed by the Supreme Court of the United States in 194 U. S. 201, 48 L. Ed. 935, it was held that the happening of an accident to a passenger while on or getting off a street railway car, which, in the usual and ordinary course of things would not happen with proper care, casts the burden upon the company in an action against it by a passenger to recover for injuries so received, of explaining the circumstances of the accident, in order to relieve it from liability. In that case the Court, at page 549 (20 App. D. C.), said:

"The plaintiff was a passenger on the defendant's car, and, as such, was entitled to the highest degree of care and caution on the part of the carrier for her protection against injury. It is true, to make out a prima facie case, the burden

of negligence on the part of the defendant, as the cause of the injury, was upon the plaintiff, but this burden is changed in the case of a passenger, by showing that the accident occurred that caused the injury to the plaintiff while the latter was a passenger. The burden of proof is then cast upon the defendant to explain the cause of the accident, and to show, if that be the defense that the plaintiff was negligent, and that her negligence caused or contributed to the production of the injury. Inland & Seaboard Coasting Company vs. Tolson, 139 U. S. 557."

## See also:

Gleeson vs. Va. Midland Ry. Co., 140 U. S. 435; New Jersey R. & Transp. Co. vs. Pollard, 22 Wall. 341.

In a number of the State Courts the same rule has been followed, and it has been frequently held that a presumption of negligence will be indulged in as against the defendant from the fact that an accident happened to a passenger which according to the ordinary course of things would not have happened if proper care had been exercised, and that the burden was on the carrier to relieve himself from the presumption where the plaintiff was without fault.

Caldwell vs. New Jersey Steamship Co., 47 N. Y. 282; Indiana Union Traction Co. vs. Scribner, 93 N. E. 1014, 1021; Le Banc vs. Sweet, 31 So. 766, 107 La. 355.

In the case last cited the Court said:

"Reduced to the simplest form the rule may be

stated to be that the carrier is bound to exercise the strictest diligence in receiving a passenger, conveying him to his destination, and setting him down safely, that the means of conveyance employed and the circumstances of the case will permit \* \* \*

"It is sufficient for the passenger, suing on a contract for safe carriage, to establish the contract and show that he has not been safely set down at his destination, to throw the burden of explaining on the carrier. It is for the carrier and not for the passenger to prove what negligence and who prevented the fulfillment of the contractual obligation of the carrier." (31 So. 772, 773.)

This rule was applied in New York in the case of Barnes vs. New York Central and Hudson River Railroad Company, 87 N. Y. Sup. 608. In that case a passenger sustained personal injuries by slipping at night on an asphalt pavement having on it oil or grease, while alighting from a train, in the train-shed of the company. This evidence was held sufficient to raise an inference that the railroad company had not exercised that care which the law requires, and to justify a verdict on the doctrine of res ipsa loquitor. The Court said:

"There must be reasonable evidence of negligence, but when the thing causing the injury is shown to be under the control of a defendant, and the accident is such as, in the ordinary course of business, does not happen if reasonable care is used, it does, in the absence of explanation by the defendant, afford sufficient evidence that the accident arose from want of care on its part."

In construing the "Harter Act" it has been held in a number of cases that the owner is bound to exercise the utmost care in the selection of a master and crew and in providing a vessel in all respects seaworthy in order to avail himself of the provisions of the act, that the burden of proving that a vessel was seaworthy at the beginning of the voyage, or that due diligence had been used to make her so, rested upon the ship owner, and that such affirmative proof could not be supplied by inferences or presumptions.

Brinson vs. Norfolk & Southern R. Co., 86 S. E. 371, 169 N. C. 425; W. J. McCahan Sugar Refining Co. vs. The Wildcroft, 201 U. S. 378, 50 L. Ed. 794; Ceballos vs. The Warren Adams, 74 Fed. 413, 20 C. C. A. 486; The Oneida, 128 Fed. 687, 63 C. C. A. 239;

## And see also:

Bradley vs. Lehigh Valley R. Co., 153 Fed. 350, 82 C. C. A. 428.

Where, as in the case at bar, the injury complained of is admitted by the answer, the burden of proof is cast upon the defense to show affirmatively the matters of justification or defense set up.

> Treadwell vs. Joseph, Fed. Cas. 14157; The Rhode Island, Fed. Cas. 11745.

In the present case the libellees did not sustain the burden of proof, but, on the contrary, the great weight of the evidence shows affirmatively that they were negligent so far as the equipment of the shower bath was concerned, and that this negligence caused the accident.

(b) The degree of care required of the carrier and the application of the rule.

A carrier owes to the passenger the highest degree of care, diligence and skill known to careful, diligent and skillful persons engaged in the business, not only in the furnishing of competent and skillful employees, but also by providing safe agencies or means employed by the carrier in the transportation of passengers, and in the facilities intended for use by the passenger on the journey.

Pennsylvania Company vs. Roy, 102 U. S. 451, 26 L. Ed. 141;

International Mercantile Marine vs. Smith, 145 Fed. 891, 76 C. C. A. 423.

In a case where a passenger caught his foot in an open space between a float and the boat from which he alighted, and was injured, it was held that a common carrier was bound to provide seaworthy and adequately equipped boats, as well as to use well-known and approved appliances for the safety of the passengers.

Rizzo vs. Winnisimet Company, 104 N. E. 363, 217 Mass. 19.

In another case, that of *Burrows* vs. *Lownsdale*, 133 Fed. 250, 66 C. C. A. 650, the Court held that a gangplank, consisting of a plank 10 feet long, 16 inches wide, and one inch thick, with cleats nailed on one

side, but having no railing, rope or other guard, and which when extended from the deck of a steamer to a wharf, sloped downward at an angle of thirty degrees, did not furnish a reasonably safe means for discharging passengers, nor could its use be justified by custom. At page 251 of the decision, the Court said:

"We also agree with the court below that the plank used by the officers of the steamer in question was not a safe method for the discharge of its passengers. It is not a sufficient answer to say, as do the appellants, that it is the same kind of a plank that is usually used by similar boats plying those waters, and that it has generally, if not always, been found sufficient. Such a plank as that described, extending over the water at such an angle, without any railing, ropes, or guards, is not a reasonably safe means of passage for man, woman or child of whatever age. The law makes it the duty of the carrier to provide a reasonably safe means for discharging its passengers, and the failure of appellants in that regard in the instance in question rendered them clearly liable in damages."

The same rule was applied in the case of *The City* of *Portsmouth*, 125 Fed. 264, in which a passenger was injured who, in the exercise of due care stepped or was thrown by the lurching of a vessel into a space caused by the vessel swinging away from the dock.

In Lobdell vs. Bullit, 13 La. 348, it was said that steamboats carrying passengers for hire are required to be provided with whatever is requisite for their safety, and that the owners of the vessel were liable where a steamboat was destitute of a yawl and ropes to throw to a person falling overboard.

In *The North Star*, 169 Fed. 711, where a child fell over a mat at an entrance to a saloon on a passenger steamer while in charge of her mother and her nurse, and where the evidence was conflicting as to the lighting of the cabin and passage ways, it was held that the libellant was entitled to recover.

In *Hrebrik* vs. *Carr*, 29 Fed. 298, where a passenger fell from a gangplank and was drowned, and the evidence indicated that the gangway was a single narrow plank without battens or ropes, it was held that the owners were liable in not maintaining a safer gangplank.

The case of American Steamship Company vs. Landreth, 108 Pa. 264, was one where the plaintiff fell on the slippery deck of a vessel. At the place where she fell the side of the saloon was finished from floor to ceiling by a space of smooth paneling about 12 feet in length, along which there was no guard or railing to use for support. In that case it was held that, as there was neither rail nor other object affording adequate protection against injury in case of unexpected lurch, a question of negligence was presented.

A steamship company was held liable in the case of Mohns vs. Netherlands-American Steam Navigation Company, 182 Fed. 323 (C. C. A.), to a passenger who sustained injury by a mat slipping as she entered the doorway, where the mat was too small to properly fit into its place. The trial judge in his opinion said:

"The preponderance of the testimony clearly shows that the mat did not fit properly into its place, but was too small, both in length and width. This was noticed by several passengers, but apparently not by any of the steamer's people, who had made it to fit the place and evidently thought it did so. That is not enough, however, to relieve the steamer from responsibility for the lack of proper appurtenances for the safety of the passengers and it was liable for the results of the accident." (P. 323.)

The decree of the lower Court in this case was affirmed by the Circuit Court of Appeals.

In the case of Gillum vs. New York & T. S. S. Co., 76 S. W. 232 (Tex. Civ. App.), where a passenger sustained injuries owing to her having fallen on the slippery deck of the steamer when stepping from the door of the saloon, and where the defense was contributory negligence, the Court said that the fact that she had taken a long step did not show her guilty of negligence as a matter of law, and that the burden of showing contributory negligence was on the defendant.

For a ship owner to leave a loose mat sliding about a passageway used by passengers, when a violent storm is raging, is negligence.

Compagnie Générale Transatlantique vs. Bump, 234 Fed. 52, 148 C. C. A. 68.

On page 54 of the opinion, the Circuit Court of Appeals in the last named case said:

"The plaintiff was in the custody of the master of the ship on whose judgment she had a right to rely \* \* \* Again, the plaintiff was warranted in assuming, if the way led through dangerous passages, that rails or ropes would be provided and that the rugs and mats on the floor would be securely fastened."

A case closely in point is that of North German Lloyd Steamship Company vs. Roehl, 144 S. W. 322, in which a passenger was injured in a toilet-room by a lurch of the vessel. The steamship company was held to be negligent in not providing hand or guard rails in the room, and a plea of assumption of risk was held insufficient for the reason that the use of the room had been impliedly invited. The room was about three feet two inches wide and about eight feet long, and its sides were smooth, as was its tiling floor. It was lighted at night by electricity. There was no hand hold, hand or guard rail near the door, nor along either side of the room, although sister ships had been so provided. There was, however, a vertical hand rail near the seat, but this could not be reached by a person just entering the room. Just as the plaintiff entered the room the ship gave a violent lurch, causing her to loose her balance, and there being nothing for her to grasp to keep herself from falling, she was violently thrown the length of the room and was injured. (Pp. 323, 324.)

The appellate Court found, on these facts, that the failure to provide hand or guard rails near the door or along the side of the room was negligence, and held also that the fact that other steamship companies engaged in similar business had not equipped rooms of the kind in question with guard rails, if such was the fact, did not justify the steamship company in failing to provide such rails, if a very cautious and prudent person, in the exercise of that high degree of care that is required by law of a carrier of passengers, would

have provided them. The Appellate Court also ignored and disposed of the claim of the steamship company, based on the opinion of a witness, that the plaintiff might have steadied herself by putting her hands on the opposite walls. (P. 325.)

The facts in the case just cited were closely similar to those in the case at bar, with the additional fact appearing in the present case, that ships of another line, the Oceanic Steamship Company, running between San Francisco and Australia, via Honolulu, were equipped, and had been for many years with several devices in the shower baths to insure the safety of passengers which were lacking in the shower baths on the "Great Northern."

The cases cited above show how the Courts have applied the rule relating to the care required of carriers in the transportation of passengers for hire, and they clearly show that this Court would be fully warranted in holding the appellees in this case liable for the injuries sustained by Mr. Hutchins while using the shower bath on the "Great Northern." It was part of the undertaking and contract of the owner of the vessel that she was suitable in every particular for the undertaking, and evidence which merely leaves the question in doubt will not relieve the carrier. (The Emma Johnson, Fed. Cas. 4465.)

A careful reading and analysis of the evidence in the case, and an inspection of the photographs introduced, can but lead to the conclusion that the Great Northern Pacific Steamship Company was negligent in failing to equip the shower baths with devices that would have prevented the accident. Such devices should have been furnished, of course, not only to safeguard the passengers during favorable weather conditions, but also during such times as unfavorable weather might cause a lurching or rolling of the ship. The opinions of the witnesses on the subject, especially where no particular qualification was shown, are entitled to but little weight. The facts speak for themselves, and this Court can draw the conclusions.

## II.

The employment of an incompetent physician and surgeon for service on the vessel rendered the libellees liable for the additional pain and suffering caused the appellant as a result of the incompetency.

I. The nature of the injury and its treatment by other physicians than the ship's surgeon indicated that there was but one proper method of treatment.

A number of the witnesses testified as to the nature of the injury sustained by the libellant and the treatment rendered him by physicians other than the surgeon of the ship.

The libellant himself said, on direct-examination, that he felt a crunching in his shoulder, so much so that it seemed to him he had dislocated it. (Tr., p. 75.) Shortly after the accident the pain became excruciating. (Tr., p. 85.) He suffered pain from the time of the accident until the vessel arrived in port on the morning of February 21st, 1916, and immediately upon his arrival in Honolulu, libellant consulted Dr. C. B. Wood, who made an examination

of him. (Tr., pp. 85-89.) Dr. Wood directed him to go to Dr. Straub, and have an X-ray photograph taken, which was done. (Tr., p. 91.) At Dr. Straub's suggestion Mr. Hutchins then returned to Dr. Wood's office, and Dr. Wood bound up the arm. About 28 yards of bandage was used, and this was put on every second day for about four weeks. (Tr., pp. 91-92.)

Dr. C. B. Wood, a qualified physician and surgeon, on behalf of the libellant, testified on direct-examination, that on February 21st, 1916, Mr. Hutchins visited him professionally, and that he then made an examination. He found a disability of Mr. Hutchin's left arm at the shoulder joint. Hutchins was unable to move the arm very much himself, and would not allow anybody else to move it because it was painful. The Doctor suspected, from Mr. Hutchins' condition, a fracture, and advised the taking of an X-ray photograph. This protograph showed a fracture in the left shoulder joint. The Doctor did not make any positive diagnosis until he saw the X-ray plate, but the symptoms were symptoms of fracture, not plainly visible, but plainly demonstrable. The fracture did not show any great amount of deformity. It belonged to the class called impacted fractures. There was no great displacement of the bones, or any particular deformity over the shoulder. In moving the arm, which the Doctor did as well as he was able, he did not note the slipping and grating sounds which are wanted when there is a displaced fracture. These signs are all absent in what is called an impacted fracture, which is what the injury proved to be. The whole shoulder was discolored, and away down on the chest and over the back there was a dark coloring under the skin. It was there a long time. Any fracture around a large joint is a serious fracture. Dr. Wood treated Mr. Hutchins until the latter part of March. As soon as Dr. Wood ascertained that there was a fracture he immobilized the arm by means of bandages, and kept it in position for several weeks. Mr. Hutchins was apparently suffering a great deal of pain at the time, and the pain continued, when the shoulder was moved, as long as the Doctor treated him. From his examination in the first instance the Doctor was satisfied that the injury was something more than a bruise, and suspected a fracture as soon as he manipulated the shoulder. The first examination took him ten or fifteen minutes, and he was very well satisfied that there was a fracture. Mr. Hutchins' last visit to the Doctor was about March 28th, 1916, and at that time he was not using the arm for ordinary purposes. As to the effect of the fracture upon the arm and shoulder, as to length, etc., there must have been some shortening there in the bone, because the shaft of the bone, as shown by the X-ray picture, was pushed into the head of the bone, not to a great extent but to some extent. In an examination made of Mr. Hutchins a few days before February 17th, 1917, the Doctor found that the arm would not go as far behind as it ought to because of the pain, and by raising it over the head, the same thing resulted, although you could get it pretty well up. At Dr.

Wood's suggestion, another X-ray plate was made by Dr. Hobdy. In the bandaging of the shoulder Dr. Wood stripped Mr. Hutchins to the waist, brought the arm up into position, and fastened it there with bandages and adhesive straps. As Mr. Hutchins was a heavy man, and perspired very freely, in two days the Doctor removed all the bandages, washed his skin thoroughly with soap and water, and then with alcohol, powdered him, and then replaced the bandages. That was done every two days for a considerable length of time. (Tr., pp. 131-136.)

On cross-examination Dr. Wood described in detail the manipulation of the arm, and said that immobilizing the arm consisted in tying it up in the most comfortable position and preventing it being moved, the main object of immobilizing being to prevent movement. It can be done with bandages or plaster of paris casts. He considered both methods and thought it sufficient to put the arm up snugly in bandages and keep his eye on the bandages, rather than fasten Mr. Hutchins up in a big, stiff, plaster of paris cast. The shoulder was not out of position and did not require what would be called setting. (Tr., pp. 136-144.)

On redirect-examination Dr. Wood said that judging by what he knew of the injury and from his observation of the X-ray plates, taken in connection with a recent examination after the lapse of nearly a year, his opinion was that there might be some slight permanent result in the limitation of all the motions of the

joint, and perhaps twinges of pain in making extreme motions of the joint for some considerable time longer. He thought that was evident enough. (Tr., pp. 148-149.)

On recross-examination Dr. Wood said that from his examination of the injury it appeared that the whole length of bone must have been driven towards the shoulder, otherwise the impacted fracture would not have occurred. (Tr., pp. 150-151.) On redirectexamination he said that an impacted fracture was caused by the bone being shoved up into the joint, the hard portion of the bone being shoved into the soft portion. Before the doctor saw the X-ray plate, the symptoms indicated an impacted fracture. The symptoms were a serious injury to the joint, which meant a probable fracture, and in the absence of deformity, and a crepitus, his opinion then was that it was an impacted fracture. Having formed the judgment that it was fractured, and then failing to get a crepitus or displacement or bone deformity, he judged it was impacted because those things were absent. p. 154.)

Dr. W. C. Hobdy, a doctor of medicine, holding a diploma and license to practice medicine and surgery in the Territory of Hawaii, and a practitioner there of seven years' standing, called for the libellant, on direct-examination, said in the month of March or April, 1916, Mr. Hutchins was referred to him by Dr. Wood primarily for the purpose of having an X-ray examination made of the injured shoulder. The shoulder was very painful at the time and Dr. Hobdy

did not make an extended examination of the shoulder itself, or attempt to have him move it at all. From the superficial examination he made he thought there was in all probability a fracture or a severe injury of the shoulder, or the head of the arm bone, the humerus. Upon making the X-ray picture he found a fracture of the neck of the humerus, which had not only been broken, but had been driven into the head of the bone. It was what was called an impacted fracture. It was a serious fracture. (Tr., pp. 177-178.)

Dr. G. F. Straub, a qualified physician and surgeon, practicing in the Territory of Hawaii, on behalf of the libellant, testified on direct-examination, that in February, 1916, he took an X-ray picture of Mr. Hutchins' arm and found an impacted fracture of the right upper end of the humerus. He also made some examination of the injury. He moved the arm and felt some symptoms that pointed to a fracture. He also found an inability on the part of the patient to move the arm, he could not elevate it, due to the severe injury to the upper part. The doctor said he knew Mr. Hutchins was suffering pain at the time. (Tr., pp. 189-190.)

Dr. Barney R. Simons, a witness for the libellees, testified on direct-examination that after Mr. Hutchins fell in the shower bath he helped get him out immediately, and that he was unconscious. The ship's surgeon was sent for at once, and Mr. Hutchins was assisted to a stool. He complained of severe pain in the heart and shoulder, gasping the words very in-

audibly, placed his right hand to his heart, and then lapsed into an unconscious condition again. The ship's surgeon, assisted by Dr. Simon and the steward, then carried Mr. Hutchins out of the bathroom lobby. (Tr., pp. 575-576.)

All of this evidence goes to show that the injury sustained by Mr. Hutchins was a very serious one, requiring prompt and efficient medical treatment, such treatment as was in fact given by Dr. Wood upon the arrival of Mr. Hutchins in Honolulu. The surgeon of the ship, however, by his treatment of the injury, showed that he was grossly incompetent.

2. THE ACTIONS OF THE SURGEON OF THE VESSEL AND HIS TREATMENT OF THE INJURED MAN SHOW GROSS INCOMPETENCE.

A number of witnesses testified in the case as to the manner in which the surgeon of the ship treated the injury.

The libellant, on direct-examination, said that after the injury the ship's doctor was sent for and he, Hutchins, was taken to his stateroom, the doctor and the steward going with him. The doctor then made an examination of the arm and of the bruises to see if there was any injury. The doctor's name was R. J. McAdory. Mr. Hutchins told him he thought his shoulder was broken. The doctor took hold of his arm, moved it around, felt of his shoulder, and said, no, it was a bad sprain. The doctor said he could feel the broken points of the cartilage, and explained that around the edge of the shoulder socket there was a cartilage that had undoubtedly broken away, that it

was simply a sprain, and that he could feel the prickly points of this cartilage. Mr. Hutchins was then laid in his berth, and the doctor examined his limbs, but did not find anything further. The doctor gave Mr. Hutchins a couple of pellets, asked him if he wanted some brandy, to which Mr. Hutchins replied that he did not drink anything, and then left him, without doing anything else. The whole thing did not last over five or ten minutes. The accident happened about half-past six in the morning, and the doctor did not call at Mr. Hutchins' stateroom again during that day. The next morning he came while Mr. Hutchins was getting dressed, but the doctor did not then put bandages on the arm, or take any other steps to render surgical aid. He did nothing further. The doctor told him that it was simply a bad sprain, and said it would be all right in a few days. The morning after the accident, when the doctor visited Mr. Hutchins, he moved the arm around a little, said there was no fracture, but that it was a bad sprain, and went out. The doctor did not do anything more at any time after that during the voyage. The accident happened on the morning of the 18th, the vessel arrived at Hilo early Sunday morning, the 20th, and reached Honolulu at about 10:00 o'clock on the morning of the 21st. (Tr., pp. 83-86.) Neither the ship's doctor nor the captain suggested to Mr. Hutchins that he go and see another surgeon, at any time. (Tr., p. 93.)

On cross-examination Mr. Hutchins testified that he did not think the doctor occupied more than about five minutes in making the first examination. Mr. Hutchins kept complaining and told him it was his shoulder, and told his wife that his right shoulder was injured, and said to the doctor: "I think, doctor, I have broken my shoulder." The doctor moved the arm around a good deal, but did not give any advice or instruction, and said it was just a bruise or a sprain, a bad sprain, and that it would be all right in a few days. The doctor went out and returned in a few moments with the pellets, which he gave Mr. Hutchins. The next morning the doctor manipulated the arm to some extent. It was very painful and there was a great deal of rigidity so that it could hardly be moved at all. It was so rigid that morning that Mr. Hutchins could hardly get his undergarments on. (Tr., pp. 160-163.)

On redirect-examination Mr. Hutchins said that after the doctor made the second visit to his stateroom, he saw him every few hours around the ship, probably a dozen times in all, and that each time the doctor saw him Mr. Hutchins had his arm supported by putting his hand through in the vest, with the other hand supporting it, and the doctor saw him in that condition. The second examination in the stateroom the morning after the accident lasted only about eight or ten minutes. There was no one with him at that time. (Tr., pp. 168-169.) Mr. Hutchins told the doctor how he had fallen, that he had fallen out of the bath, and injured his shoulder, and that he felt very badly injured and, in fact, was very sure it was broken. Mr. Hutchins felt a crunch of the bones and told the doctor

that, saying, "Doctor, I am sure I have got a broken arm." (Tr., p. 175.)

Captain Ahman, of the "Great Northern," testified on cross-examination, that he saw Mr. Hutchins on the evening of the 18th of February. The doctor had not then reported the accident to the captain. The report was made the next morning, and was to the effect that Mr. Hutchins had fallen and hurt his shoulder slightly. (Tr., pp. 482-483.)

Dr. Robert J. McAdory, the surgeon of the vessel, testifying for the libellee, on direct examination said that his first connection with the injury sustained by Mr. Hutchins was when he was called to the bathroom where the injury occurred. When he arrived he found Mr. Hutchins sitting on a stool gasping and breathing heavily, and apparently suffering a good deal of pain. The doctor made no examination of him there, but learned from some bystander that Mr. Hutchins had slipped in the bathroom and had fallen on his shoulder. Mr. Hutchins was taken to his room, and after he had been put in bed the doctor first administered a grain of codeine, which, in some measure, alleviated his pain. This was administered in little tablets of half a grain each. The doctor then left to attend another call, and returned after an interval of probably ten minutes. At this time the doctor made a slight examination of the shoulder. He rotated the arm, having in mind the possibility of a fracture there, but, owing to the voyage being near the close, and as Mr. Hutchins was suffering a good deal, he did not care to subject him to the necessary manipulation and ascertain

the absolute condition of the joint, as whoever subsequently would take charge of the case would have to go through the same formality and subject the patient to additional manipulation and unnecessary suffering. The doctor said, in his opinion, if the fracture was an impacted one, where the bones would act as a splint for themselves, there would not be any injury in allowing the arm to go without immobilizing it for two days, while, on the other hand, if the ends were asunder, it would not be wise to let the broken bone go without immobilizing it because the jagged ends would be tearing into the soft parts at every movement. It was not entirely clear in the doctor's own mind what the matter was, and for that reason he recommended the making of an X-ray photograph as soon as Mr. Hutchins arrived in Honolulu. The doctor said he did not remain with Mr. Hutchins longer than about five minutes after he returned from the other call. He noticed Mr. Hutchins the same evening with his arm held up in a sling by a large silk handkerchief. The doctor said he did not follow up the case very closely subsequently but saw Mr. Hutchins at meals or on deck occasionally. At the time of the accident there was no deformity displayed, no objective symptom in that direction, but the doctor thought there was a slight abrasion on the elbow. He saw Mr. Hutchins subsequently in Dr. Wood's office, when he was very much bruised over the chest on that side, and over the arm. (Tr., pp. 368-380.)

On cross-examination Dr. McAdory said that after he had looked at Mr. Hutchins' arm in the stateroom he did not think he told him he had sustained a bruise. He did not think he used the term "bruise", but thought he used the term "contusion", but he would not swear positively as to that. If he had immobilized the arm at the time the accident happened, it would not have done any harm even if it had been a bruise. (Tr., pp. 383-384.) It would have taken probably about half an hour to have immobilized the arm. The grain of codeine was administered to Mr. Hutchins shortly after they got him in bed. Codeine is an analgesic, it does not numb the senses but eases the pain. He did not know whether there were any other doctors on board the "Great Northern" on that voyage and made no inquiry to find out. (Tr., pp. 385-386.) Outside of administering the grain of codeine the doctor did not give Mr. Hutchins any more medicine on that voyage, did not make any sling or cause any sling to be made for his arm, and did not undertake to immobilize the arm. He heard a grating of the sesamoid bones around the front of the glenoid, but he could not definitely state it was that particular bone. It did not give the same grating sound that a crepitus would. Mr. Hutchins was a heavy man, and had told the doctor that he fell out of the bathroom on his left shoulder, and the doctor saw him sitting on the stool gasping and suffering pain. The doctor did not think it was the proper thing in view of what took place and in view of his examination, to immobilize the arm under the conditions. (Tr., pp. 393-395.)

Dr. McAdory was the only witness in the case who was of the opinion that the arm should not have been immobilized immediately after the happening of the accident. As this was merely his own unsupported

opinion as to his own competency, this testimony, of course, has no weight.

On further cross-examination the doctor said that he would have had no trouble in administering an anaesthetic or of getting the assistance of any doctor on board in case of necessity. The immobilizing of the arm, even if it was only a bruise, would not have subjected the patient to any injury, and could have been done with perfect safety, with the exception of a possibility of excoriations of the skin, which would have caused some physical discomfort. At the time he made the examination he had a suspicion in his mind that there was a fracture of the shoulder or arm, and the reason he did not immobilize it then was because the symptoms that he could elicit were not sufficient to clear the matter up in his mind. (Tr., pp. 401-404.)

On rebuttal, Mr. Hutchins said that nothing was said by Dr. McAdory about putting the arm in a sling. He said it was a bad sprain and would be all right in a few days. Mr. Hutchins did not put any sling on, but unbuttoned his vest, placed his arm in position, and held it up until the arrival in Honolulu. Dr. McAdory did not say anything about having an X-ray picture taken either. (Tr., p. 423.)

The libellees' witness, Barney R. Simons, said that when Dr. McAdory came to the bathroom where the accident happened, he did not ask for any general description or history of the case. About two hours after the accident Mr. Simons passed the doctor on the deck and asked how the patient was. The doctor said that he was getting along very nicely; that he was badly

bruised, and that he had given him a hypodermic, and he came around all right. Nothing was said by the doctor as to whether there was a broken bone in the arm, but his conclusion was that the arm was just a bit bruised. (Tr., pp. 584-585.)

3. The evidence in the case overwhelmingly establishes that the surgeon of the vessel was grossly incompetent.

Aside from the evidence in the case showing the nature of the injury, and the proper method of treatment, as shown by the testimony of skilled physicians and surgeons other than the ship's doctor, there is considerable testimony of an affirmative nature that proves that Dr. McAdory was not only negligent, but was grossly incompetent.

Dr. C. B. Wood, the libellant's witness, testified on cross-examination, that provided a physician was given an opportunity to see the shoulder he should have discovered after the first examination, that there was something more than a bruise or an external injury, and discovering that, should have made the best possible effort to find how extensive the injury was, and should have immobilized the arm. (Tr., p. 144.)

On redirect examination Dr. Wood said that assuming that the doctor visited Mr. Hutchins within a few minutes after the accident, then made an examination and did nothing more than to give him two pellets, and next morning came back and made another examination, in his opinion, he would be able to discover that there was something more than a

bruise the second day. (Tr., pp. 147-148.) Dr. Wood also said that a competent physician knowing or hearing from a patient how such an injury had occurred, observing the symptoms, and knowing the history of the case, in his opinion should have suspected that there was probably an impacted fracture at the time he first examined him after the injury was sustained, and suspecting it, should have taken all the means he considered necessary and best to prevent motion of the joint. From the symptoms he should have strongly suspected an injury to the joint, and an impacted fracture there, the treatment of which would be a fixing of the arm so that it could not move or what is known as immobilization. There was nothing in such treatment that would have been improper if the injury had been a bruise or sprain only. A competent physician who had seen the symptoms soon after the injury occurred, and who knew how the injury was sustained, should have immobilized the shoulder joint, and stronger reasons would exist for a physician doing that on the second examination 24 hours later. (Tr., pp. 154-157.)

Dr. W. C. Hobdy, another of the libellant's witnesses, said on direct examination that the proper treatment for Mr. Hutchins' injury under the circumstances, and eliminating any facts that were disclosed by the X-ray examination, would be absolute immobilization, that is, keeping the arm absolutely still. (Tr., pp. 179-181.)

On cross-examination Dr. Hobdy said that the symptoms that would be manifested at once, or in the course of thirty minutes after the injury, would be,

first of all, pain, and, second, and most important, the loss of limitation or function, that is, inability to move the arm about. He thought any competent surgeon should have been able from the symptoms that necessarily manifesed themselves within thirty minutes after the injury, to have diagnosed what was the matter. and that from the history of the case learned from the patient and from the symptoms that manifested themselves, a competent surgeon should have known that there was probably a fracture. In answer to questions by the court, Dr. Hobdy said that any good surgeon in Honolulu would have immediately made a diagnosis tentative of fracture. The idea of fracture would have entered into any competent surgeon's mind at once. If a surgeon treats a bruise as a fracture, there is no great harm done to the patient, but if he treats a fracture as a bruise, there might be harm done. It was necessary, of course, for a surgeon to have a history of the case. (Tr., pp. 181-187.)

Dr. G. F. Straub, on behalf of the libellant, testifying on direct examination, said that if he had had to treat Mr. Hutchins' case he would have immobilized the arm, either would have put the arm in a simple sling and fastened it with bandages, or would have put a triangle of wood, which is a much favored treatment in such cases. Before Dr. Straub took the X-ray picture he felt a slight crepitation which made him suspect a fracture, and, having that suspicion, he would have immobilized the arm. If a physician had been called in directly after the accident occurred, and a history or a statement of how the accident occurred

had been communicated to him, and if he made an examination, he should have immobilized the arm, and if the injury had been simply a bruise the same thing should have been done, because if it was a simple bruise, the immobilization would do no harm. Upon being asked whether it was skillful treatment to allow the arm to remain as it was without bandaging it, or without immobilizing it, from the 18th of February until the 21st, the witness said he did not see where the treatment came in, there was no treatment at all. Skillful treatment, under the circumstances, would mean immobilization. (Tr., pp. 190-198.)

After this evidence of incompetency had been presented to the lower court, and during the hearing, the court said (Tr., p. 202):

"As far as the proof goes up to date the doctors have testified . . . that from the symptoms that would naturally exhibit themselves immediately after this injury, a competent physician should have known that there was a probable fracture and should have treated it as a fracture."

The court also said that the testimony of these doctors of course would tend very strongly to prove, to put it mildly, that the physician, Dr. McAdory, was not competent, otherwise he would have treated the case in the way in which they said a competent physician would have treated it. (Tr., p. 202.)

John S. Ford, the purser of the "Great Northern," on behalf of the libellant, said on direct examination that Dr. McAdory's name was on the ship's articles as the ship's surgeon, and that he drew a salary of \$75 per month. (Tr., pp. 230-231.)

On cross-examination Mr. Ford said that in addition to the salary the doctor was allowed to charge any passenger that came aboard, and that his meals were included with his salary. (Tr., pp. 234-235.) On redirect examination he said that the doctor was paid by the ship to look after the passengers under the direction of the captain, and any money he got outside of this salary was voluntary. (Tr., pp. 235-236.) The only authority the purser knew of for charging passengers was that the doctor was allowed to by the company. (Tr., pp. 237-238.)

Dr. McAdory himself testifying for the libellees, on direct examination said that he was 45 years of age, had been a physician since 1897, and was licensed to practice medicine and surgery in California, Arizona, District of Columbia and Territory of Hawaii. During the past three years he had been surgeon with the Toyo Kisen Kaisha, the American-Hawaii Steamship Company, United Fruit Company and the Great Northern Pacific Steamship Company. He had also served on the hospital ship "Relief," on the transport "Valencia," on the transport "Grant" and on the transport "Logan." (Tr., pp. 360-362.)

Dr. C. B. Wood, on behalf of the libellant, was called in rebuttal, and said on direct examination that it was not necessary to administer an anaesthetic in Mr. Hutchins' case before immobilizing the arm and that immobilization was the propert treatment. (Tr., pp. 415-419.) On cross-examination he said that in Mr. Hutchins' case the surgeon should have ascertained not perhaps exactly what the injury was, but

that there was a painful and somewhat serious injury to the patient's shoulder joint, and that the recognized treatment in cases of that kind as to immobilizing the joint should have been carried out anyway. (Tr., pp. 419-423.)

The court below in its findings and opinion said:

"The evidence does not show that the surgeon did anything he should not have done, or that anything he did caused any injury or suffering. He simply administered codeine to alleviate libellant's suffering. He did not treat the injury at all, because, he says, he was not sure there was a fracture, and because, he says, the vessel would arrive in Honolulu in sufficient time to admit of deferring treatment until such arrival. That he should have at once properly treated the injury so as to permit a recovery to begin at once is doubtless true. But he did not. Is the vessel liable for such damages as resulted from his failure to do so?" (Tr., p. 668.)

Notwithstanding the fact that the evidence of all of the disinterested doctors who testified in the case clearly established the incompetency of Dr. McAdory, and notwithstanding the fact that the court during the hearing, and after it had heard the medical testimony, said that a competent physician should have known that there was a probable fracture and have treated the injury as a fracture, and that the testimony of the doctors tended very strongly to prove "to put it mildly" that Dr. McAdory was not competent, as he did not treat the injury as a competent physician would (Tr., pp. 201, 202), the court in its opinion and findings said:

"Whether the vessel is liable for injuries caused by incompetency of the physician employed even though due caution was exercised in his selection and employment, or is liable for damages caused by his incompetency only when it has failed to exercise due care in his selection and employment, it is unnecessary to decide in this case, because there is no evidence to justify a finding that the surgeon was incompetent." (Tr., pp. 675-676.)

This finding of the Court cannot be reconciled with the evidence in the case in any particular. All of the evidence bearing on the point shows that the surgeon of the ship was grossly incompetent. There is not only no evidence in the case to warrant the assumption that the surgeon was competent, but the evidence establishes affirmatively and clearly that he was not. The contrary assumption of the Court is in conflict with the evidence and is evidently based upon a misconception of it.

As we have already shown in another part of this brief, this Court may disregard the findings of the trial judge, and may form its own conclusions based upon the record.

4. The incompetency of the surgeon of the vessel caused the appellant pain and suffering that would not otherwise have resulted.

The Court below found that the evidence did not show that the surgeon did anything he should not have done, or that anything he did caused any injury or suffering. (Tr., p. 668.) The Court also found that there was no evidence of any damages caused by in-

competency. (Tr., p. 676.) Neither of these findings are supported by the evidence but are directly contrary to it.

Dr. C. B. Wood was asked the question on redirect-examination, when called as a witness for the libellant, as to what effect, in his opinion, the fact that there was no bandaging of the arm, and no adoption of any other method, from the time the injury resulted on February 18th, until the vessel arrived in Honolulu on the 21st, would have, and he answered, unequivocally, that it would have the effect of unnecessarily submitting the patient to pain. (Tr., p. 149.)

This is another instance where the Court below either misconceived the effect of material and uncontradicted evidence in the case, or absolutely ignored it.

5. The appellees did not exercise due care in the selection of a surgeon for service on the vessel.

It was contended by counsel for libellees in the Court below that under the law there could be no liability on account of the surgeon's negligence or incompetency unless the libellees failed to exercise due care in the selection of the surgeon. While we do not believe this is a proper construction of the law but that an absolute duty rested upon the libellees to provide for the ship a competent surgeon, we yet contend that even if the law is as claimed by libellees the testimony in the case shows that there was no due or reasonable care exercised by them in the selection of

the surgeon Dr. McAdory for service on the "Great Northern."

Captain Ahman, on behalf of the libellees, stated on direct-examination, that Dr. McAdory was first engaged as surgeon of the ship about November 15th, 1915. He asked the doctor if he had any experience at sea, and was told that he had been in the Pacific Mail. The doctor also said that he had been in the United States Army but the captain did not know where he had served. The captain did not look into the matter of what certificate the doctor had, if any, because the hiring was by the marine superintendent, Mr. Wiley. At the time no fact or circumstances came to the knowledge of the captain to raise the question of competency or incompetency. The captain's belief was that he was a doctor. During the doctor's service, the captain had no knowledge of any complaint having been made by the passengers regarding the competency. (Tr., pp. 278-281.)

On cross-examination the captain said that the inquiries relative to competency were with the doctor himself. He did not ask any other doctor about the matter, was not told what college the doctor came from, and did not write to any of the colleges or hospitals where the doctor had been or served. (Tr., p. 281.)

Mr. John B. Morris, the engineer of the vessel, on behalf of the libellees, testified on direct-examination, that Dr. McAdory was engaged as ship's doctor on November 6th, 1915. It was the duty of the marine superintendent to engage surgeons for the ship. Mr.

Morris was sitting in his room talking business with Mr. Wiley, on the ship, when Dr. McAdory knocked at the door, came in and asked for Mr. Wiley. Mr. Morris said: "Here is Mr. Wiley, right here." The doctor then introduced himself. They had evidently had some correspondence, and Mr. Wiley inquired: "Doctor have you a certificate for practicing in the State of California?" The doctor replied: Mr. Wiley said: "You have been on different ships?" To which the doctor replied. "Yes." Mr. Wiley then inquired what places he had been, and the doctor mentioned two ships of the Toyo Kisen Kaisha, the "Tenyo" and the "Chiyo Maru" the witness thought, but was not positive. He was not sure that he mentioned any other steamship line, but he did say that he had been an army surgeon at Camp McKinley in Honolulu. (Tr., pp. 310-312.)

Dr. McAdory, himself, also testified for the libellees as to the manner of his employment. On direct-examination, he said, that he made application to the marine superintendent, Mr. C. W. Wiley, for the position of physician and surgeon on the "Great Northern" when he learned she was going on the Honolulu run. He saw Mr. C. W. Cook, the marine superintendent of the American-Hawaiian Company in San Francisco, and showed Mr. Wiley letters from the American-Hawaiian Company, the Toyo Kisen Kaisha, and the Medical Society of the State of California. The doctor was then appointed, Mr. Wiley saying, that he would try him out for one trip. The doctor first saw Mr. Wiley on board the steamship

"Great Northern" in the room of Mr. Morris, the Chief Engineer, who was present at the time. The letters and certificate referred to were shown to Mr. Wiley at the Palace Hotel. When the doctor first saw Mr. Wiley he was in close consultation with Mr. Morris upon some ship matters, and was very busy. He said he had not taken the matter up before, that there were several applicants, and that he would consider it later. The interview with Mr. Wiley then lasted scarcely a minute. The doctor waited several days and then called on Mr. Wiley again. About the only place he could be seen was down on the dock, at the ship. The doctor saw him again in Mr. Morris' room and asked him if he had done anything about it. Mr. Wiley said he would take the matter up that afternoon if the doctor would come to see him at the hotel and discuss it. About five o'clock in the afternoon the doctor met Mr. Wiley at the Palace Hotel and showed him the letters. Wiley said: "Well, I will try you out for one voyage, consider the matter closed." That conversation lasted only as long as it took Mr. Wiley to say what the doctor testified and to read the letters. The papers were shown to Mr. Wiley at the interview at the Palace Hotel. The letters and certificate were introduced in evidence and marked "Libellees Exhibits 2, 3, and 4" (Tr., pp. 62-65.) The first was a statement on a letterhead of the Tovo Kisen Kaisha, dated November 11th, 1914, signed W. H. Avery, to the effect that Dr. McAdory was engaged by that company as ship's surgeon from September, 1913, to May, 1914, that during the time he served in that capacity his services were found to be eminently satisfactory, and that they had no hesitancy in recommending him to anyone desiring the service of a gentleman of his capability. The next was a certificate on a letterhead of the Medical Society of the State of California, dated November 12th, 1914, signed "Philip Mills Jones, Secretary," to the effect that Dr. McAdory was a regularly graduated physician, licensed to practice in the state and for some time had been favorably known to the office. The third was on a letterhead of the steamship "Honolulan," American-Hawaiian Steamship Company, dated August 25th, 1915, to the effect that Dr. Mc-Adory had been surgeon on the "Honolulan," plying between San Francisco and New York, via the Panama Canal, from November, 1914, to August, 1915, and that his services were entirely satisfactory and were only terminated when the company discontinued its passenger business.

Mr. C. W. Wiley testified for the libellees, by deposition, and on direct-examination said, that he had been employed by the Great Northern Pacific Steamship Company, as Marine Superintendent, from July 1st, 1915, until August 1st, 1916, and as such superintendent was in charge of the hiring and discharging of all men connected with the actual operation of the steamships "Great Northern" and "Northern Pacific". He engaged Dr. McAdory in October, 1915, as surgeon for the "Great Northern" and the doctor continued as such until the ship was taken off the Honolulu run the latter part of April or the first of May,

1016. Written application was made by the doctor to the witness for the position, stating what ships he had been on. The doctor mentioned the Toyo Kisen Kaisha Company, and presented letters from the Medical Society of California and from Captain Anderson of the steamship "Honolulan". Mr. Wiley said he was well acquainted with Mr. C. W. Cook, the Pacific Coast manager of the American-Hawaiian Steamship Company, and went personally to Mr. Cook's office and asked him about the record and services of Dr. McAdory while in their employ on the "Honolulan." Mr. Cook gave a very good recommendation stating that the doctor's services had been entirely satisfactory. Mr. Black, of the Bank of California in San Francisco, also came to Mr. Wiley and recommended Dr. McAdory, stating that he had been a passenger on a trip from San Francisco to New York and could recommend Dr. Mc-Adory very highly as a ship's surgeon, as the doctor had attended to himself and his folks. Mr. Wilev also asked Dr. McAdory if he had a certificate permitting him to practice in California, and the doctor answered that he had. No matter or thing came to the knowledge or attention of Mr. Wiley he said in any manner reflecting upon the qualifications or competency of Dr. McAdory as a physician and surgeon, and, in his opinion, Dr. McAdory's services were entirely satisfactory. He never heard any complaint during the season Dr. McAdory served on the "Great Northern" as to the doctor's qualifications or competency. The complaint of Mr. Hutchins, the libellant, did not come to the knowledge of Mr. Wiley during that season, and had only just come to his knowledge at the time he testified on March 6, 1917. (Tr., pp. 632-639.)

On cross-examination Mr. Wiley said he did not know of his own knowledge what institutions of learning Dr. McAdory attended, that he did not remember making any inquiry at the time Dr. McAdory was employed for the "Great Northern" as to what institutions of learning the doctor had attended, and the length of his attendance at the same, and that his employment by the American-Hawaiian Steamship Company and his employment by the Toyo Kisen Kaisha Steamship Company was what he based his judgment on in hiring the doctor for the position on the "Great Northern". He understood that Dr. Mc-Adory had a license to practice medicine under the laws of the State of California. The doctor was signed on the ship's articles at \$75 per month, and at the end of the season, was given a bonus, which, according to the best of Mr. Wiley's recollection would make his salary equal to about \$100 per month for his services. (Tr., pp. 632-643.)

It can hardly be said that under these circumstances the libellees exercised that due and reasonable care in investigating the competency of Dr. McAdory that the law requires. On both of the occasions when Dr. McAdory interviewed Mr. Wiley on the vessel the time consumed in discussing the matter was negligible. At the interview at the Palace Hotel, where, for the first time, Mr. Wiley was put in possession

of the letters or certificates, but a few moments intervened before the doctor was engaged for the service. The letters or certificates themselves were in the form common to such general recommendations, and were probably secured as most such recommendations are, upon a bare request and without any real consideration of the efficiency or competency of the person recommended. The whole matter of employment seems to have been done in a very perfunctory manner, and in the great haste. The personal conversations Mr. Wiley had with Mr. Cook and Mr. Black do not appear to have occurred prior to the employment. They could not have occurred, as shown by the record, after Mr. Wiley had been put in possession of the letters of recommendation, because that matter occurred at the interview at the Palace Hotel, and as soon as Mr. Wiley was handed the letters and had read them he employed the doctor. There was no independent investigation by Mr. Wiley as to whether the doctor actually held a certificate to practice medicine or whether his license had been revoked, and there was no inquiry by Mr. Wiley into the personal habits of the doctor or as to his record in the army. The doctor appears to have been hastily employed upon his own word that he was a licensed physician and had the experience he claimed. The very fact that a person of Dr. McAdory's age and assumed experience was willing to devote his whole time as a physician and surgeon for \$75 or \$100 a month and board, in itself was sufficient to call for some personal investigation at sources where the facts could be ascertained

As showing the perfunctory manner in which the duties of officers of a ship are frequently performed, and how little the officers and employees really know in relation to matters that are supposed to be within the scope of their duty, Mr. Wiley himself testified that the complaint of Mr. Hutchins, the libellant, did not come to his knowledge until the time he testified, on March 6th, 1917, although the injury occurred more than a year prior to that time, and yet Mr. Wiley assumed to say that Dr. McAdory's services on the "Great Northern" were entirely satisfactory and that he did not know of any complaint by anyone as to the doctor's qualifications or competency. The court below, too, notwithstanding the fact that the testimony showed no real investigation as to the matter of competency, found that there was no evidence of negligence in the selection and employment of the doctor, and that the evidence showed the exercise of due care in regard thereto. (Tr., p. 676.)

The appellees not only did not sustain the burden of proof of showing due care and diligence in the selection of the surgeon, but the evidence affirmatively shows lack of care and of diligence.

6. The Legal Liability of the Appellees by Reason of the employment of an incompetent physician.

Under the state of facts disclosed by the testimony narrated above concerning the nature of the injury, and its treatment, or lack of treatment, by the surgeon of the ship, it is contended by the appellant that the appellees are liable for the additional pain and suffering caused Mr. Hutchins as a result of the doctor's incompetency. The basis of the liability is a statute of the United States.

## (a) The statute applicable.

The statutory requirement that steamships of the character of the "Great Northern" shall be furnished with a competent surgeon is found in the Act of Congress of August 2, 1882, c. 374, Sec. 5 (Sec. 8002, U. S. Compiled Stats. Ann.), which provides as follows:

"In every such steamship or other vessel there shall be properly built and secured, or divided off from other spaces, two compartments or spaces to be used exclusively as hospitals for such passengers, one for men and the other for women. And every steamship or other vessel carrying or bringing emigrant passengers, or passengers other than cabin passengers, exceeding fifty in number, shall carry a duly qualified and competent surgeon or medical practitioner, who shall be rated as such in the ship's articles, and who shall be provided with surgical instruments. medical comforts, and medicines proper and necessary for diseases and accidents incident to seavoyages, and for the proper medical treatment of such passengers during the vovage, and with such articles of food and nourishment as may be proper and necessary for preserving the health of infants and young children; and the services of such surgeon or medical practitioner shall be promptly given, in any case of sickness or disease, to ANY of the passengers, or to any infant or young child of any such passengers, who may need his services. \*

(b) The question of due care in the selection of the surgeon.

The statute just quoted has been construed by the courts in but a few instances. It is the contention of the appellees that the owners of a steamship performed their full duty when they exercised due and reasonable care and diligence in the selection of a surgeon for service on the vessel. The appellant, on the other hand, contends that the statute requires that the vessel be actually furnished with a competent surgeon, and that the exercise of due care in the selection, if as a matter of fact an incompetent man is selected, does not meet the requirements of the law. The appellant also contends that the evidence in the case shows conclusively that due care and diligence was not in fact exercised by the officers of the steamship company in the selection of the surgeon of the vessel who treated the injuries sustained by Mr. Hutchins, and that in any event the vessel is liable for the negligence of its surgeon.

There apparently is but one Federal case that supports the theory of the appellees. It is the case of The Napolitan Prince, 134 Fed. 159. This case holds that the errors, mistakes or negligence of a ship's doctor in caring for a passenger are not imputable to the ship, where it was not negligent in selecting him. The case, however, contains nothing but the bare statement unsupported by the citation of any decisions, does not refer to or discuss the statutory duty, ignores the fact that the statute requires that a competent surgeon be

actually furnished and not merely due diligence and care in the selection, and ignores the further fact that the statute by requiring that the surgeon shall be rated in the ship's articles places him on the same footing as any officer of the ship or member of the crew.

The case of Laubheim vs. DeKoninglyke N. S. S. Co., 107 N. Y. 228, 13 N. E. 781, held that where a surgeon is selected for duty on shipboard, the ship owners are bound only to the exercise of reasonable care and diligence in the selection of a competent person for the position, and are liable, not for the negligence of the surgeon, but only for their own negligence in making the selection. In this case, however, the evidence was contradictory as to the propriety of the surgeon's treatment. The lower court (51 N. Y. Super, Ct. 467) held that the defendant was not liable because the surgeon's act did not cover the performance of any obligation of the defendant to the plaintiff. The decision on appeal was based upon the cases of Chapman vs. Railway Company, 55 N. Y. 579; McDonald vs. Hospital, 120 Mass. 432, and Secord vs. Railway Company, 18 Fed. 221. One of these cases involved the doctrine of fellow servant, and had no relation to the duty a carrier owes to its passengers. Only one of them concerned the relationship of carrier and passenger. These cases, however, do show that a much higher degree of care, even in cases involving the fellow servant doctrine, is required in the selection of a servant, than was given by the appellees in the case at bar.

The case of Chapman vs. Railway Company, 57

N. Y. 579, held that, "in employing subordinates the principal must exercise great care, and is required to institute affirmative inquiries to ascertain their character and qualifications, and negligence in this respect will create a liability."

In McDonald vs. Hospital, 120 Mass. 432, it was merely held that the Massachusetts General Hospital, a charitable institution, with no capital stock, no provision for making dividends or profits, and holding its funds in trust to sustain the hospital, was not liable for the negligence of a physician, or for the unauthorized assumption of one of the hospital attendants to act as surgeon, because under such circumstances the only contract that could be implied was to use reasonable care in the selection of its agents.

The case of Secord vs. Railway Company, 18 Fed. 221, was one where a passenger on a train was injured by a collision. There was a conflict of testimony as to the advice and treatment rendered by the surgeon provided. The Court charged that the railroad company having assumed to furnish a surgeon had taken upon itself the duty and obligation of furnishing a competent surgeon, and not beyond that. That the person selected must be a competent man, reasonably fitted for the duties he is called upon to perform; that his status was different from the other servants, in that the plaintiff might have selected another physician, and that if the surgeon was a competent man, and a proper and responsible person for the railroad company to select, it would not be liable for a particular case of negligence. If, on the other hand, he was incompetent the responsibility would rest on the company. (Pp. 224, 225.)

It will be seen that neither of these three cases support the broad doctrine laid down in Laubheim vs. De Koninglyke N. S. S. Co., supra.

In the C. S. Holmes, 209 Fed. 970, the owner of a vessel was held not liable for the negligence of a physician employed by the master to treat an injured seaman, where the master exercised reasonable care in the selection, but this was on the theory that the duty was analogous to that required in employing competent fellow servants, and upon the further theory that where the employer engages a physician to treat injured employees and receives no profit himself, he is not liable if ordinary care is used in selecting the physician. The duty that a carrier owes to a passenger is of a much higher nature.

There are a number of cases where the questions of master and servant and fellow servants were involved, that pass upon the question of the duty of the master to investigate the competency of the servant. These cases are to the effect that an employer is not justified in assuming that a servant who seeks a position is well qualified for it, and that it is well established that where the service in which the servant is employed is such as to endanger the lives and persons of employees, or where peculiar fitness is required, the master, upon engaging such servant, is required to make reasonable investigation into his character, skill,

habits of life, and fitness for the duties assigned to him.

Western Stone Company vs. Walen, 151 III. 472, 38 N. E. 241, 244;
Mann vs. Del. & Hud. Canal Co., 91 N. Y. 495;
Norfolk & W. R. Co. vs. Nuckols, 91 Va. 193, 21 S. E. 342, 347;
Ala. & F. R. Co. vs. Waller, 48 Ala. 459.

In Evansville & T. H. R. Co. vs. Guyton, 115 Ind. 450, 17 N. E. 101, 103, the Court said:

"In case peculiar fitness was required, or special qualifications demanded for the service to be performed, unless it was assured by the previous like service of the conductor of his fitness, the duty of the company required it to institute affirmative inquiries in order to ascertain his qualifications in that regard."

In the case of Richardson vs. Carbon Hill Coal Co., 10 Wash. 648, 39 Pac. 95, a fellow servant case, it appeared that the physician was incompetent, and there was no direct proof that the company had been negligent in selecting him. It was there held that the company must in any event have exercised reasonable care in the selection of the physician, and that the mere possession of a diploma or license would not be sufficient evidence of his competency, for having this he might still be totally unfit to perform the services of a physician.

These cases all go to show that a much more careful investigation as to the qualifications of an employee is required than was made by the appellees in this case.

(c) The incompetency of the surgeon of the vessel as a matter of law.

The uncontradicted evidence in the case shows that Dr. McAdory was incompetent. Aside from this, his incompetency is established, as a matter of law, by the manner in which he treated the injury.

A single act under some circumstances may show an individual to be an improper and unfit person for a position of trust or for a particular service. So the manner in which a specific act is performed may conclusively show the utter incompetency of the actor and his inability to perform a particular service.

Baulec vs. N. Y. & H. R. Co., 59 N. Y. 356.

There may be negligence of such a character in the discharge of responsible functions or the performance of a dangerous duty, as possibly to amount to proof of the unskillfulness of the person who is so grossly negligent.

Kindell vs. Hall, 8 Colo. App. 63, 44 Pac. 781.

A single act, with the circumstances surrounding it, may tend very strongly to show the incompetency of the actor to perform the service to which he was assigned.

Evansville & T. H. R. Co. vs. Guyton, 115 Ind. 450, 17 N. E. 101, 103.

"The delinquency which caused the injury may be of such a flagrant character as to warrant the conclusion that only an unfit servant could have committed it."

Editorial note, 48 L. R. A. 387.

(d) The statutory duty to furnish a competent surgeon on the vessel and the liability for negligence of the surgeon.

There seems to be no sound reason why a passenger who has suffered by reason of the incompetence or negligence of the surgeon of a ship should not recover damages from the vessel, or why the surgeon should be placed on any different footing than any other officer or employee on the vessel who is selected to perform a duty for the passengers.

The general rule is that a passenger on a vessel injured while on a voyage without his fault, through the negligence of the officers or employees, is entitled to no less care from the ship than a seaman, and its duty is not fulfilled by giving him such care as an ordinary unskilled person can afford him.

Northern Commercial Company vs. Nestor, 138 Fed. 383, 70 C. C. A. (9th Circuit) 523.

In Korzib vs. Netherlands-American Steam Nav. Co., 169 Fed. 917, the vessel was held liable for the negligence of a stewardess, upon the theory that she, being one of the vessel's agents, did not perform her full duty to the passenger.

Under a statute requiring a full complement of licensed officers and a full crew it was held in Northern Commercial Company vs. Lindblom, 162 Fed. 250, 89 C. C. A. 230, that the officers and crew must be competent, not only for the ordinary duties of an uneventful voyage, but for any exigency that is likely to happen.

In construing the "Harter Act," which provides that if the owner of a vessel shall exercise due diligence to make the vessel in all respects seaworthy, etc., neither the vessel nor owner shall be liable for loss or damage to cargo, resulting from faults or errors in navigation, etc., a number of well-considered cases have held that such provisions do not change the general maritime law, so as to relieve the owner from his obligation to provide a seaworthy vessel and substitute therefor an obligation merely to use due diligence to see that she is seaworthy.

The Carib Prince, 170 U. S. 655, 660-662, 42 L. Ed. 1181, 1186; The Ninfa, 156 Fed. 512; International Nav. Co. vs. Farr & Bailey Mfg. Co., 181 U. S. 218, 45 L. Ed. 830; Nord-Deutscher Lloyd vs. President, etc. of Ins. Co. of North America, 110 Fed. 420, 425, 49 C. C. A. 1; The C. W. Elphicke, 122 Fed. 439, 58 C. C. A. 428.

In The Cygnet, 126 Fed. 742, 61 C. C. A. 248, it was held that the "Harter Act" did not relieve a vessel from liability for loss of cargo resulting from the gross fault or negligence of the master sufficient to raise a presumption of his incompetency, merely upon a showing that the owners had no knowledge or reason to believe that he was incompetent, that being insufficient to establish "the due diligence" required by the statute, the burden of proving which under such state of facts rested on the vessel. The Court on pages 742 and 746 of the opinion in this case says:

"All that appears in the record in reference to him (the master of the tug) is that he was an engineer, had sailed on the Cygnet for two seasons as such, had been captain of another small steamer, had acted as a pilot up and down the Merrimac River, had a license as a pilot on that river which permitted him to act as master of a tug of the tonnage of the Cygnet, and had been her master a short time before the barge was lost. There is no evidence in the record that the owners of the tug, either the record owners or the owners pro hac vice, had made any particular inquiries as to his competency.

"In our prior opinion, in determining that the loss occurred through the fault of the master of

the tug, we said as follows:

"'It appears that the Captain of the tug neither looked to see whether the tow was straightened out on its course, nor received any information from the lookout in that respect after passing the

red buoy.'

"This red buoy, we will note, was at the critical point in the navigation of the river. An omission so gross as this raises so strong a presumption of fact that the master was not competent as practically to throw the burden on the petitioners to establish the proposition that they used due diligence with reference to his selection, whether the statute does or does not impose such a burden. Yet the other facts which appear in the record, so far from meeting this presumption, strengthen it. We are, therefore, not satisfied that whoever controlled the tug used the due diligence which the statute required in the selection of this master necessary to justify us in relieving her from the liability for this loss which the common law imposed as the result of gross negligence at the critical time."

Under the Passengers' Act of Great Britain, passed August 14, 1855, which provided that every passenger

ship should carry a duly qualified medical practitioner, and that the owner should furnish a proper and necessary supply of medicines to be properly packed and placed under the medical practitioner's control, it was held in Allen vs. State S. S. Co., 132 N. Y. 91, 30 N. E. 482, that the ship owner had no supervision over the medical practitioner, and its duty ceased on complying with such requirements, and that it was therefore, not liable for injuries incurred by a passenger by taking calomel furnished by the medical practitioner through negligence or mistake, in response to a request for quinine.

The effect of this case, which construed an Act of Parliament similar to our Federal Statute relative to furnishing a competent physician for passanger vessels, is to hold that it is the duty of the carrier to comply with the statute, that is to actually furnish a competent surgeon. It does not hold that this duty can be performed by merely exercising diligence or due care in the selection.

To the same effect is the case of O'Brien vs. Cunard Steamship Company, 154 Mass. 272, which construes our Federal Statute, and holds that the ship owners do their whole duty if they employ a duly qualified and competent surgeon and have him in readiness for such passengers as choose to employ him, but that they cannot interfere in the treatment by the medical officer when he attends a passenger, and are not responsible for his negligence and want of care in performing surgical operations.

This case does not construe the law so as to warrant the substitution of due care in the selection of the surgeon for the statutory duty to actually provide a competent person.

No sufficient reason appears in any of these cases, however, why the vessel should not be liable for an act of negligence by a surgeon towards a passenger, the same as would be the case if the negligence resulted from the act of any officer or employee on the vessel.

A surgeon of a vessel is a seaman the same as a pilot, a ship's carpenter or a boatswain.

U. S. vs. Thompson, Fed. Cases, 16,492.

A vessel is liable for damages for a collision, which was entirely the result of the gross mismanagement of a pilot which the law compelled the master to take.

The China, 74 U.S. 7, 19 L. Ed. 67.

The rule is concisely stated in the case of *Sherlock* vs. *Alling*, 93 U. S. 99, 23 L. Ed. 819, 822, where the Supreme Court of the United States, in a case involving the negligence of a pilot, said:

"By the common law the owners are responsible for the damages committed by their vessel, without any reference to the particular agent by whose negligence the injury was committed. By the maritime law the vessel as well as the owners, is liable to the party injured for damages caused by its torts. By that law the vessel is deemed to be an offending thing, and may be prosecuted without any reference to the adjustment of the responsibility between the owners and employees for the negligence which resulted in the injury. Any departure from this liability of the owners, or of the vessel, except as the liability of the former

may be released by a surrender of the vessel, has been found in practice to work great injustice. The statute ought to be very clear before we should conclude that any such departure was intended by Congress."

There is no sound reason why a vessel should be held liable for the negligence of a pilot, where the owners have no power of selection, and in the case of a surgeon, though they have the opportunity of selecting him, should not be held liable unless in such selection they have been wanting in due care. In any event it is the duty of the vessel to furnish a surgeon who is in fact competent.

### CONCLUSION.

The libellant in this case is entitled to recover.

"When carriers undertake to convey persons by the powerful and dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence; that the personal safety shall not be left to the sport of chance, or the negligence of careless servants." (Citing R. R. Co. vs. Derby, 14 How. 468.)

"\* \* Although the carrier does not warrant the safety of passengers at all events, yet his undertaking and liability as to them go to the extent that he or his agents, where he acts by agents, shall possess competent skill, and so far as human care and foresight can go, that he will

transport them safely."

"\* \* \* The carrier is required, as to passengers, to observe the utmost caution characteristic of very careful, prudent men. He is responsible for injuries received by passengers in the course of their transportation, which might have been avoided or guarded against by the exercise

on his part of extraordinary diligence aided by the highest skill. And this caution and diligence must necessarily be extended to all agencies or means employed by the carrier in the transportation of the passenger."

Pennsylvania Company vs. Roy, 102 U. S. 451, 455, 456; 26 L. Ed. 144.

The appellees fell far short of the duty they owed the appellant under the law, both as to the shower bath facilities they furnished and as to the surgeon they employed for service on the vessel.

Respectfully submitted,

Frederick Milverton, Attorney and Proctor for Appellant.

THOMPSON & CATHCART, GEO. A. DAVIS,

Of Counsel.

Dated, San Francisco, Cal., April 25th, 1918.

# United States Circuit Court of Appeals For the Ninth Circuit

CLINTON J. HUTCHINS

Appellant

VS.

AMERICAN STEAMSHIP "GREAT NORTHERN," Her Engines, Boilers, Tackle, Apparel, Boats, Furniture and Appurtenances, and A. Ahman, Master, Bailee and Claimant Thereof, and The Great Northern Pacific Steamship Company, a Corporation, Owner Thereof

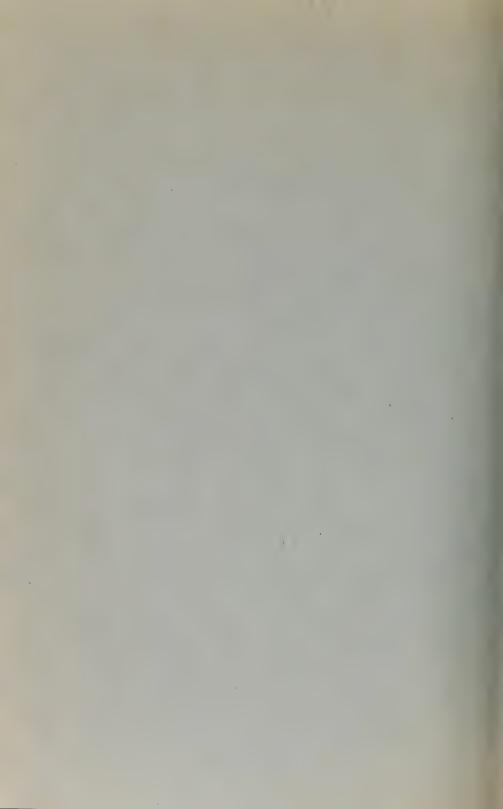
Appellees

# **BRIEF OF APPELLEES**

Upon Appeal from the United States District Court for the District and Territory of Hawaii

CAREY & KERR,
Proctors for Appellees.

SMITH, WARREN & WHITNEY, of Counsel.



# United States Circuit Court of Appeals For the Ninth Circuit

CLINTON J. HUTCHINS

Appellant

VS.

AMERICAN STEAMSHIP "GREAT NORTHERN," Her Engines, Boilers, Tackle, Apparel, Boats, Furniture and Appurtenances, and A. Ahman, Master, Bailee and Claimant Thereof, and The Great Northern Pacific Steamship Company, a Corporation, Owner Thereof

Appellees

# BRIEF OF APPELLEES

Upon Appeal from the United States District Court for the District and Territory of Hawaii

The appellant is specific in his statement of the negligence imputed to the vessel and its owners.

Briefly stated his claim is that the base or bottom of the shower bath was a porcelain bowl about two feet or so square, with sides from three to four inches high, with a slight depression in the center, and a slope thereto from all directions to the drain in the center of the bowl; that the sides of the shower bath were constructed of marble slabs, with service pipes for both hot and cold water running up the side of one of the marble slabs; that in order to reach and enter the bath, it was necessary to step over the top of the rim of the bowl; that the bowl was slippery and difficult to stand upon and there was no provision made by means of rails or otherwise for grasping or holding on in case of slipping, nor was there any provision made by rubber mats or otherwise to prevent slipping and falling in the bath.

The answer of the master of the ship, as claimant, denies negligence and denies faulty construction and unsuitableness of the bath. It also denies that the floor or bowls were in any respect more slippery than any porcelain floor or other clean and sanitary bath fixture; and denies that there was no provision by means of rails or otherwise for holding on in case of slipping. The answer shows that the steamship was provided with numerous bath rooms, some fitted with porcelain tubs and others with showers, and all of the latest modern and most commodious and practical design and equipment, and that it was optional with the libellant, whether he would use a shower bath or tub bath. That the bath was well lighted by electric light, and the whole method of construction, the form, the materials used, and the facilities provided and available for holding, and the condition of the bath as to being slippery or otherwise, were all plainly visible to the libellant. The shower bath is described by the claimant as follows:

- "(3) That at all of the times mentioned in said libel the shower bath referred to in the said libel as that in which or in connection with which the libellant is alleged to have been injured was and is a room approximately thirty inches square, having its walls made of upright marble slabs, open in front and having a pipe overhead and across the front as a curtain rod or support carrying sliding rings for front curtain: that the floor thereof was formed by a porcelain basin of the most approved and modern material and type, measuring approximately twenty-four inches square, practically level, having no more slope than was and is necessary for proper drainage, and having sides about six inches above the level of the outside floor. That the said basin or floor was not difficult to stand in or upon, nor was the said bathroom or its equipment in any respect unsafe or dangerous, or carelessly or negligently constructed, or likely in any manner to cause a person using the same to slip or fall.
- (4) That the said shower bathroom was and is provided with a metal handle plainly visible and firmly fixed on the back wall at a convenient height for any person to reach, for instant use if desired; besides which there were a number of other convenient and immediately accessible means of support in and about the said shower bathroom; all of which were plainly visible and conveniently available and useful for the purpose of being taken or used by any person using the said shower bathroom

should occasion require or such use thereof seem desirable.

(5) That said floor or basin was made of porcelain which is the usual and approved material for such purpose, to insure cleanliness, and was clean and no more slippery than any other porcelain bath."

The answer also alleges that the placing of rubber mats or other floor covering in the basin or on floor of the bath rooms is not necessary, efficient or of any value in rendering the floor any more safe to stand upon, consistent with proper cleanliness and practical use thereof, and that the bath room was proper and safe in construction and equipment. Contributory negligence is also claimed.

On this state of the pleadings the case was tried, beginning on February 16, 1917, in open court at Honolulu. The court heard most of the witnesses, but in addition thereto the depositions of several witnesses were produced in behalf of the appellees and one deposition in behalf of the appellant. By arrangement during the trial, the judge visited the ship when it was at Honolulu, in company with representatives of the parties (pp. 301, 212, 260), and examined the bath room and the shower bath in question. After argument the case was taken under advisement and a written opinion was filed by the court on the 3d day of April, 1917 (p. 645), and final decree was entered dismissing the libel on April 13, 1917.

During the hearing the libel was amended by the addition of paragraph 4a, as shown on pages 35 to 38. In substance this additional allegation alleges negligence in the employment of the ship's physician and negligence and want of care in the treatment of the appellant by this physician. Answer to this paragraph 4a was made by the claimant as set forth on page 44, denying the allegations.

After the appellant had offered evidence in support of his case, a motion was made by the appellees, to strike from the record all of the testimony adduced by the appellant relating to the subject matter of this amendment and answer thereto. The court took this motion under advisement (pp. 238-9).

## DESCRIPTION OF THE ACCIDENT.

Mr. Hutchins in testifying as a witness, repeats several times his description of how the accident happened. In substance his claim is set out on pages 74 and 75:

"A. On the night before, on the 17th, I told the bath steward that I would like to have a shower bath in the morning about half past six, and he came and called me about half past six and I got up and threw on my overcoat over my pajamas and went into the bath, and I hung up my overcoat and my pajamas and I went over to the bath and I turned the water on. There were two shower baths facing each other, and I used the one facing the shower baths on the right, and I went up to the shower bath and put my hand in and put my right foot over into the bath,—it was rather a high bath, a high-sided bath, rather hollow, and I put my foot in it and felt of the water, the temperature of it on my arms, and then I put my left foot over, and then I slipped, and I put my hand out to catch hold of something and I fell over into the other shower bath which was on the opposite side.

The Court: You mean on the other side?

A. Yes, I fell sideways, and I reached out for something to get hold of, but there was nothing to hold on to, and I felt a crunching in my shoulder, my arm slipped out from under me, so much so that it seemed to me that I dislocated the shoulder. . . . .

(P. 76): Mr. Davis: Where were both feet?

- A. In the basin.
- Q. Just before you fell just fully describe what you reached for and what you did particularly?
- A. Why, as I pulled my left foot up and over following the right as I felt of the water and was going to get in the shower, the water was coming down very heavily, it was instantaneous, I put both feet in and I reached out to grab for anything.
- Q. Was there anything for you to reach hold of?
  - A. Nothing.
- Q. Where did you grab for, where did you reach for?
  - A. Anything to get hold of.
- Q. Your face was towards the back part of the bath?
  - A. Yes.
  - Q. And how did you reach out?
- A. I reached out as hard as I could with my right arm.
  - Q. And there was nothing to catch hold of?
  - A. No."

He also testifies that the basin was porcelain, was filled with water and very slippery; the sea was calm, and he did not notice any movement that morning. "It was the only morning we had when there seemed to be none." Did not notice that the ship was rolling or pitching. (p. 77.)

On page 82 he adds that at the time of the accident:

"I had my hands out feeling for the water, and then I pulled my left foot over and just as I put my weight on both feet they flew out from under me."

And again on page 123 he was asked:

"Q. Had you gotten into the water falling from the shower before you slipped?

A. Just in it, just going under it. The water was splashing onto me, just as I got in, I got almost under it, part way under it at least when my feet flew out. I wasn't wholly under the water at the time.

(P. 124): Q. On what foot was your weight resting more than the other, if either, when you slipped?

A. If heavier on any it was on the right.

Q. More on the right?

A. More on the right than on the left. I pulled my left, it was over, and just as I got it down they flew from under me.

Q. You had not really then set your weight back on the left foot before you slipped?

A. I think they were so close there was scarcely any difference, if any.

Q. Practically even?

A. Practically even, yes."

Mr. Hutchins also testified on page 159 as follows:

"Q. In falling did both of your feet fly out simultaneously, or first one and then the other?

- A. Practically about the same time. When I felt myself go both feet flew out, there was no stopping till I finally found that I had struck something. My large toe was black the next morning. My feet went out that way and I caught myself here. The soreness here did not disappear for months.
- Q. Did you have any warning whatever of the slip before it occurred?
  - A. Practically none.
- Q. You had time only when you realized your feet had flown out to endeavor to turn and strike as safely as you could?
- A. I grabbed for anything this way, and threw out this hand and then I went down.
- Q. That is, you grabbed out with your right hand?
  - A. Yes.
- Q. That was a spasmodic grab, to grab hold of anything there was to catch hold of?
  - A. Yes, anything.
- Q. You did not have in mind that you were grabbing at any particular thing?
  - A. Nothing at all.
- Q. It was practically an involuntary grabbing motion to save yourself?
  - A. That's it.
- Q. Which you might have made if you had been in clear air?
  - A. Yes.
- Q. Were you feeling the water with one or both arms?
- A. Both, rubbing it on my arms this way with my hands."

And on page 166, on cross examination:

"Q. You are wearing glasses, Mr. Hutchins?

A. Yes, sir.

Q. How long have you worn them?

A. About twenty years.

Q. You wear them constantly?

A. Yes.

Q. Did you have them on that morning?

A. No.

Q. Are you able to see as well without glasses as with them?

A. Not as clearly. I can see everything but it does not clear up until I put my glasses on."

The specific negligence claimed and on which the appellant rests his case is in the shower bath, as distinguished from the room in which the shower bath was located. According to his testimony he slipped in the basin of the shower bath itself.

According to his testimony, furthermore, he was foolishly stepping into a porcelain basin under running water without using his hands to steady himself.

But assuming for the moment that the condition of this shower bath was such that the ship would be answerable under the circumstances described, it was for him to sustain the burden of proof that the accident happened in the manner alleged. The weight of the evidence indicates that the accident happened entirely outside of the shower bath, and in a different manner, and the trial court so found.

There was but one eyewitness to the accident other than the appellant himself. This was Dr. Barney R. Simons of Philadelphia, Pa., whose deposition was taken in behalf of the appellees, and whose description of the accident differs materially from that of the appellant. Dr. Simons testifies (p. 574) as follows:

"A. Mr. Hutchins stood in the space between the two showers—the passageway between the two showers at a point where I have placed the x with a circle around it on the plan.

Q. Will you tell us just exactly what happened?

A. Mr. Hutchins stood where I have marked the plan with an x and a circle around it and as he was a large man he occupied practically the entire passageway so I couldn't enter the shower opposite the one in which he was tem-pering the water. I sat down on the stool marked on the plan with a square and observed Mr. Hutchins until such time as he might get out of the passageway so I could enter the opposite shower. Mr. Hutchins stood with his left hand against the wall marked xxx on the plan and with his right hand he was tempering the water—I might say, feeling the temperature of the water. The ship at about this moment lurched. At the same time Mr. Hutchins endeavored to step into the shower. stepped with his right foot forward, resting his weight on the left,—when his left foot slipped

from under him and he fell with his left shoulder upon the edge of the basin of the shower marked S. He fell helplessly—I mean by that he had no chance to catch or save himself whatever, as he fell. . . .

- (P. 576.) Q. At the time Mr. Hutchins fell he was in the act of stepping into the shower?
  - A. Basin. Stepping under the shower.
- Q. He slipped when his one foot was still in the passageway and the other was in the air?
  - A. Was in the air.
- Q. And it was the foot which was still in the passageway which slipped out from under him?
  - A. That is right.
- Q. And it occurred coincident with the lurching of the ship?
  - A. Coincident with the lurching of the ship.
  - Q. He stepped with which foot?
- A. With right foot resting his weight on the left.
- Q. As he stepped did he support himself against the side of the shower or did he just step in?
- A. I can't recall that. The last I can recall is where he stood with his left hand against the wall which I have marked with the three x's (xxx). I can't say whether or not he dropped this left hand as he started to step under the shower.
- Q. He didn't support himself with the right hand?

- A. I didn't see that there was anything there to support him with the right hand.
- Q. Could he not have supported himself by placing his right hand against the side of the shower?
- A. He could have caught hold of that marble slab. He could have caught a hold of the slab on the after side of the shower marked (y) with his right hand. Of course I can't say what support that would have given him.
- Q. At the time of the accident I understand you to say it was very well lighted and all the conditions which existed were perfectly obvious to him?

A. Yes."

Dr. Simons also testified that there was evidence of rough weather and the ship was pitching, rolling and lurching occasionally (p. 574 and p. 577). And on page 586 he repeats:

"Mr. Hutchins had not yet placed his foot in the basin when he fell. his foot had not been put down in the basin; it had been raised in the air in the act of stepping in and was over the basin."

Thus, according to this witness, who appears to be entirely disinterested, the accident happened while Mr. Hutchins was still upon the tiled floor of the bath-room, not in the shower bath itself. Dr. Simons had an excellent opportunity to see exactly what occurred as he was sitting in the bath-room facing Mr. Hutchins and but a few feet from him, waiting his own turn to enter one of the shower baths. (p. 574.)

The trial court, after careful consideration of the testimony of both Mr. Hutchins and Dr. Simons, concludes that the testimony of the latter is the more reliable. The court said (p. 660):

"There is a sharp conflict in the evidence as to whether the libellant's fall which caused his injury, was caused by slipping on the floor of the bathroom or by there being no hand-hold on the wall, even if it were conceded that there was no hand-hold there. There was an eyewitness to the accident, whose deposition, if true, shows that the libellant fell before he ever entered the bath-room, before he put either foot on the floor of the basin, and that his fall was caused by the rolling of the vessel, libellant losing his balance when he started to step into basin, one foot on the floor of the compartment outside the bath-room, the other raised for the purpose of stepping in. Dr. Barney R. Simons of Philadelphia, testified by deposition, taken September 28, 1916, that he was a passenger on the vessel at the time libellant was injured, and that he witnessed the accident, 'was the only one present and the only one who saw the accident,' that he desired to take a shower-bath himself and went to the place for that purpose, and libellant was there when he got there, that libellant was standing outside of the bath-room and occupied practically the entire passageway between the one he was about to enter and the one on the opposite side of the passageway, and he (witness) sat down on a stool near by and observed libellant until such time as he might get out of the passageway so he (the witness) could enter the opposite shower, that libellant stood with his left hand against the wall and

with his right hand was feeling the temperature of the water; 'the vessel about this moment lurched, at the same time Mr. Hutchins endeavored to step into the shower, his right foot forward, resting his weight on his left, when his left foot slipped from under him and he fell with his left shoulder upon the edge of the opposite shower.'

"I have carefully examined the deposition of this witness and I find no reason to refuse to believe his statements. He appears to be disinterested, intelligent and in every respect worthy of credence, and I think it would be contrary to common sense and the dictates of right and justice to refuse to believe him and to accept as true the statements of the libellant, who is interested, however respectable and worthy, which are so flatly contradicted by him.

"I therefore find that libellant did not slip on the bottom of basin, that he fell because he lost his balance on account of the vessel lurching when he was about to step into the bathroom, and that his fall was not caused by any negligence of the vessel or its owners or servants."

In passing we wish to call attention to the fact that the court uses the word "bath-room" to designate the enclosed space used for the shower itself, distinguishing this from what it calls the "compartment" in which the showers or "bath-rooms" are installed. This is so obvious that it would not require explanation but for the reference in appellant's brief on pages 22 to 24. The word "bath-

room" is so used by the court as it is by the appellant himself (p. 16 appellant's brief), as well as by some of the witnesses, although others use the word as including the whole compartment in which the showers or shower bath-rooms are located.

We find in appellant's brief at page 24 the claim that the "issues in the case as made by the pleadings did not leave it open to the court below to find or hold that the accident happened outside of the bath-room." It is claimed the libel alleges that the accident occurred after the libellant had entered one of the shower baths and that this is not denied by the pleadings but on the contrary is specifically admitted, and a paragraph of the answer is quoted (see page 24, appellant's brief).

This was so thoroughly answered, however, by the findings of the trial court that we will here quote (p. 662) as follows:

"Proctors for libellant strenuously insist that the answer of the claimant admits that libellant fell in the bath-room and that the admissions in the answer obviate the evidence given by Dr. Simons. I have carefully read the answer and I find no such admission.

"In support of the contention that the answer does make such admissions, one of the proctors for libellant, in a typewritten argument which he was permitted by the court to file after the argument in the case had been concluded, culls out from the sentence quoted below from the answer, the words therein which

I have underscored, omitting all the remainder of the sentence:

"'Answering the allegations of paragraph 4 of the libel, this claimant has no knowledge except by information from others, but basing his answer thereto upon his information and belief, and while admitting that the libellant, while using or attempting to use the shower room or compartment on the port side of the bath-room on "C" deck of said vessel, lost his balance and fell and sustained some bruises or injury, the exact nature and extent of which are to this claimant unknown, vet this claimant denies that said accident occurred or injuries were sustained by any negligent, careless or faulty construction of said bath or shower room or accommodations, but were in fact the result of the failure of libellant to exercise common care in view of the motion of said vessel while so traveling on the high seas.'

"It is hardly necessary to say that neither the whole of the sentence, nor the part underscored makes any admission that libellant slipped upon the bottom of the basin or that libellant ever got into the basin.

"There is no admission in the answer that obviates the facts testified to by Dr. Simons, which prove that libellant did not slip upon the bottom of the basin, but that he lost his balance and fell on account of the motion of the vessel when he started to step into the shower room and before he ever placed either foot on the floor or basin thereof."

Dr. Simons makes it plain that in saying Mr. Hutchins fell suddenly without opportunity to catch himself as he fell, he meant that he did not have

an opportunity of getting his left hand under him to break the force of his fall (pp. 581-582). The court will note that the appellant's brief does not distinguish between this and the opportunities or rather the facilities that were available for a man using due and ordinary care in stepping into a porcelain bath. It seems to be assumed that because the falling man went down so suddenly as not to have been able to save the force of the fall by putting his hand under him, that he also had no opportunity to save himself from getting into that predicament. But a child ought to know better than to step into a porcelain bath without steadying himself, so that if the appellant's description of the accident is accepted, or if Dr. Simons' description is true, it still depends upon Mr. Hutchins to justify his not having taken hold. His claim is not that he did take hold and the handle broke, or his hand grasped some fixture that was insufficient to afford the necessary support and protection, but that he tried stepping into the bath without using or trying to use the facilities furnished. He took his chance.

It seems clear that the negligence complained of in the libel (pp. 17, 18), and the slipperyness of the basin, and its faulty construction, if it existed, did not cause the accident.

We submit that the appellant did not fall by reason of any condition of the equipment or lack of equipment in the shower bath. He actually fell before he got into it, if the weight of the evidence is accepted, notwithstanding his claim in his libel and in his testimony is that the basin was slippery and that this was the primary cause of his fall. (pp. 77, 81, 174.)

If it is true (as he claims on page 160) that he stood in front of the compartment feeling the temperature of the water, splashing it over both arms, and then stepped into the basin with his right foot and brought his left foot in, and had no more than placed it on the floor of the basin when both feet shot out from under him instantaneously and he fell heavily, then we submit that his own statement shows negligence in stepping into the shower bath without attempting to support himself while so doing. He says (on page 82) that he had his hands out feeling for the water "and then as I put my weight on both feet they flew out from under me." Stepping into a bath without using one or both hands to steady himself, is equivalent to taking the risk of slipping and falling, and this would be true whether it was a shower bath or any other porcelain bath. To step into a bath tub without taking hold is to take a chance, and this is common knowledge. If his testimony is assumed to be true he ought not to recover because of his own negligence.

It may also be noted that in telling Chief Engineer Morris of the accident that same day he said

nothing about a lack of facilities to hold to, or as to lack of mats, or as to slippery surface of the porcelain, but complained of the way the base was built and to the fact that the angles or corners were rounded, as will be seen from the following excerpt from Mr. Morris' testimony:

- "A. The way he spoke of it to me was that in stepping there he had stepped on the rounding and lost his balance through that—the rounding on the bottom of the base.
- Q. Did he say anything to you as to what he claimed with reference to the liability of the company?
- A. When he mentioned it to me I said to him, 'Why didn't you hold on to something? You are on a ship; you are not on shore.'

Mr. Cathcart: We move to strike that out as being irresponsive.

Mr. Carey: Q. What did he say?

A. Well, he complained of the way that that base was built; he said that that should be of absolutely square corners.

Q. Did he say anything else?

A. No.

Q. Specifically, did he make any claim to you that there should be a rubber mat in the bath?

Mr. Cathcart: Objected to as leading.

A. No." (pp. 469-70.)

As already shown, Mr. Hutchins insisted that the weather was calm and there was little or no ship motion; but while there may have been no very pronounced rolling, there certainly was some motion.

Chief Engineer Morris said:

"The ship was rolling; not very much; I should say a roll of probably 4 degrees." "I should not say it was stormy; she had a long, gentle roll. I think the weather was pleasant that day." "All ships roll if they get the proper wave length." (pp. 474-5.)

Dr. Simons says (p. 573):

"The weather was bad and the sea was very rough."

He was asked how he recalled that it was rough. He answered:

"Most of the night before I was laving there awake. It was so rough I couldn't sleep. I like to have rolled out of the upper berth which I That morning the steward called occupied. me and said my bath was ready, and I didn't want to go because of the pitching and rolling of the ship. I told my wife I didn't think I would go, and she said, 'You haven't missed a morning bath in a year and you may be sorry if you don't take one.' And I got out very cautiously and went to the shower and supported myself with my hand on each side of the passageway—that is, on the wall of the passage as I went along. It was impossible to walk straight, unassisted, without holding on to the side of the passageway." (pp. 573-4.)

At another place in his deposition he said that the ship was pitching and rolling and lurching (p. 577). However, the condition of the sea is not left entirely to the recollection of witnesses. Reference to the ship's log-book produced by third officer George Grundy (p. 496) shows the entry that morning between four and eight A. M.:

"Fine and clear weather, light breeze, smooth sea, heavy northwest swell."

This swell must have had an appreciable effect on a vessel traveling almost west. The accident occurred about six-thirty A. M.

Our claim is that whether the accident occurred in the manner described by Mr. Hutchins, or in the manner described by Dr. Simons, there is no liability shown and the libel should be dismissed.

### TT.

## PRESUMPTIONS UPON THIS APPEAL.

The findings of fact of the trial court in an admiralty case, made upon conflicting testimony most of which was taken in open court, or where the credibility of witnesses is involved, will not be disturbed on appeal unless they are found to be clearly against the evidence.

The Hardy, 229 Fed. 985.

Peterson v. Larsen, 177 Fed. 617.

Perriam v. Pacific Coast Co., 133 Fed. 140.

The Oscar B., 121 Fed. 978.

Alaska Packers' Association v. Domenico, 117 Fed. 99.

Jacobsen v. Lewis Klondike Expedition Co., 112 Fed. 73.

To meet this, the appellant urges that there is an exception to the rule where the trial court does not have the benefit of the personal presence of the witnesses. But we submit that:

- (a) The court did have Mr. Hutchins before it and did hear his testimony, which the court decided was not conclusive, and it also had the benefit of oral testimony from most of the other witnesses; and
- (b) The judge visited and inspected the bath during the trial by arrangement with the parties and in the presence of their representatives.

The exception to the rule, therefore, does not apply in this case. No doubt where, as in cases cited and relied upon by appellant, the testimony is taken before an examiner or commissioner, the reason of the general rule would not apply. But here the court had every witness for the libellant before it excepting Lefevre. It also had many of the witnesses for the defense in open court and heard their testimony.

The appellant argues that there is a presumption of negligence arising out of the very fact of the accident.

But according to appellant's own story, he slipped in the shower basin, when placing his feet therein, while he was not holding with his hands. If he had taken hold of the handle, or the rod, or the curtain, and such appliance proved insufficient and broke, or he had taken hold of the slab or the door knob only to find the same undependable, a different case would be presented. He says the facilities provided were inadequate, but he did not put them to the test and preferred to take the step without first taking hold of anything whatever. He did not reach out until he was already falling and then it was too late to save himself.

Under these circumstances the proximate cause of his fall, according to his own testimony, was his failure to take hold. As was said in the opinion of the court in *Puget Sound T. L. & P. Co. v. Hunt*, 223 Fed. 952:

"In every personal injury case the plaintiff must establish two propositions: First, that the defendant was negligent; and second, the causal connection between the negligence and the injury complained of. Negligence is sometimes assumed, as where the doctrine of res ipsa loquitur applies, or where there has been a violation of a statutory duty, but the proximate cause of an injury is never presumed."

The doctrine of res ipsa loquitur does not apply where the plaintiff alleges specific acts of negligence, instead of general negligence.

Midland Valley R. Co. v. Conner, 217 Fed. 956.

White v. Chicago G. W. R. Co., 246 Fed. 427.

Nor does that doctrine, when applied, have the effect of shifting the burden of proof so as to make it necessary for defendant to overcome the presumption of negligence by a preponderance of evidence that there was an absence of negligence on his part.

Sweeney v. Erving, 228 U. S. 233, 33 Sup. Ct. 416.

To quote from that decision:

"The general rule in actions of negligence is that the mere proof of an 'accident' (using the word in the loose and popular sense) does not raise any presumption of negligence; but in the application of this rule, it is recognized that there is a class of cases where the circumstances of the occurrence that has caused the injury are of a character to give ground for a reasonable inference that if due care had been employed by the party charged with care in the premises, the thing that happened amiss would not have happened. In such cases it is said, res ipsa loquitur,—the thing speaks for itself; that is to say, if there is nothing to explain or rebut the inference that arises from the way in which the thing happened, it may fairly be found to have been occasioned by negligence.

"The doctrine has been so often invoked to sustain the refusal by trial courts to nonsuit the plaintiff or direct a verdict in favor of the defendant, that the application of the rule, where it does apply, in raising a question for the jury, and thus making it incumbent upon the defendant to adduce proof if he desires to do so, has sometimes been erroneously confused with the question of the burden of proof. But in the requested instruction now under consideration the matter was presented in no equivocal form. Plaintiff's insistence was not merely that the evidence of the occurrence of the injury under the circumstances was evidential of negligence on defendant's part, so as to make it incumbent upon him to present his proofs; the contention was that it made it necessary for him to prove by a preponderance of the evidence that there was an absence of negligence on his part.

"In our opinion, res ipsa loquitur means that the facts of the occurrence warrant the inference of negligence, not that they compel such an inference; that they furnish circumstantial evidence of negligence where direct evidence of it may be lacking, but it is evi-

dence to be weighed, not necessarily to be accepted as sufficient; that they call for explanation or rebuttal, not necessarily that they require it; that they make a case to be decided by the jury, not that they forestall the verdict. Res ipsa loquitur, where it applies, does not convert the defendant's general issue into an affirmative defense. When all the evidence is in, the question for the jury is whether the preponderance is with the plaintiff. Such, we think, is the view generally taken of the matter in well-considered judicial opinions."

In this case there was no collision, explosion, sudden start or stop, falling object, breaking of any part, nor was there any intervening act of an emplove or passenger. The accident happened in the usual and ordinary use of a bath, of stock pattern such as is used in sanitary bath showers in modern American homes (p. 566). There was no storm, and no greater unsteadiness of ship than what is common on a fair day with a brisk sea. And for all that appears from appellant's statement of the facts the accident might as well have happened when the ship was tied to her dock, or at any modern bath, at a hotel, public bath establishment, or private residence. There were no previous accidents, and although constantly in use upon a ship carrying many passengers no complaint had been heard about the bath.

Such an accident raises no presumption of negligence on the part of the ship and does not cast upon it the burden of disproving negligence.

The decisions uphold the statement that proof of injury to a passenger, without more, does not raise a presumption of negligence against the carrier. It is necessary for the plaintiff to show circumstances of such a character as to impute negligence, before the doctrine of res ipsa loquitur can be invoked.

13 L. R. A. (N. S.) 602 and cases collected.29 L. R. A. (N. S.) 808 and cases collected.1916 (C) L. R. A. (N. S.) 364 and cases collected.

Wyatt & Pac. Elec. R. Co., 156 Cal. 170, 103 Pac. 892.

In order to raise such presumption of negligence it is necessary to establish the fact that the injury was occasioned by the instrumentalities or facilities furnished or negligently omitted by the steamship in this shower bath, as alleged in the libel. Even if the proof of the accident is equal as to the fact that the passenger lost his balance before he got into the shower, the appellant has not made out a case. The burden is upon him to prove what he has alleged in his libel; and since the court below heard the witnesses and inspected the locus, the presumption under the rule of law relating to admiralty appeals is strongly against the appellant. Assuming therefore that the appellant and Dr. Simons are equally credible and unbiased (which of course would not usually be presumed),

and that their descriptions differ as to what occurred, neither being corroborated, still the appellant has no right to expect a reversal.

But even if the libellees have, as claimed in the libellant's brief, the burden under the circumstances shown here, of "showing that they exercised a high degree of care and furnished a safe shower bath for the use of passengers," yet this burden is amply sustained. The only witness that may be said to have furnished evidence tending to show that the facilities provided were inadequate was Hackett, whose opinion was on its face entitled to little weight to overcome the potent fact that almost constant use of the bath in all kinds of weather has not brought to light any need for change or any complaint.

The diligence of the appellant's counsel has produced a formidable array of authorities upon the high degree of care required of a carrier of passengers and the presumption of negligence from accidents to passengers. With the principle of these cases we have no controversy, but (as was said by Judge Ross, in Southern Pac. Co. v. Cavin, 144 Fed. 348, 351), it is founded upon the fact that in the nature of things the passenger can rarely know the cause of the accident. Where the circumstances show either a want of care of the passenger, or that the possible risk of accident is more open to the passenger than the carrier, so that the passenger than the carrier, so that the passenger than the carrier, so that the passenger.

senger is free to act on his own judgment, or when the danger is obvious to the passenger, or the appliance used is at the time under the control of the passenger, the general principle does not apply, and this is particularly true where the appliance in question is not defective, and is simple in character, in common and successful use and is open to the option of the passenger to make use of it or not.

To make the doctrine of rcs ipsa loquitur applicable, there must (as the phrase implies) be something in the facts which speaks for itself, and therefore each case will depend upon its own facts. The doctrine cannot establish a liability where a definite cause is clear on the evidence, for inferences are there excluded because the cause is disclosed as a definite fact. In cases of this sort the fact must be shown to be the result of the defendant's negligence before there can be a recovery.

Where there is no break, or other unusual occurrence arising out of or connected with the operation of the carrier's business, the presumption of negligence does not exist and cannot be assumed without proof.

Irvine v. Delaware L. & W. R. Co., 184 Fed. 664.

In that case Judge Gray in a fine analysis of the principles involved, cites with approval the following quotation from Thompson on Carriers (Volume 3, Sec. 2756) as follows:

"It has been pointed out by an able judge, that the presumption which arises in this case does not arise from the mere fact of injury, but from a consideration of the cause of the injury. Thus it was said by Ruggles, J.: 'A passenger's leg is broken while on his passage in the railroad car. This mere fact is no evidence on the part of the carrier until something further be shown. If the witness who swears to the injury testifies also that it was caused by a crush in a collision with another train of cars belonging to the same carriers, the presumption of negligence might arise—not however from the fact that the leg was broken, but from the circumstances attending the fact. . . shown by other decisions, the meaning of the foregoing doctrine is, that the mere fact that a passenger has sustained some injury of an unknown or obscure character, proceeding from an unknown or obscure source, while in transit in the carrier's vehicle, does not of itself raise the presumption that the injury proceeded from the negligence of the carrier. The presumption arises from a consideration collectively of the fact of the injury, and of the kind or source of it. The fact of an injury alone is not sufficient. It must be traced to the carrier."

The decisions of the Supreme Court referred to on page 81 of appellant's brief are also examined by Judge Gray in the Irvine case, and he shows that misconception has arisen from considering certain language in these cases apart from the facts, and that in these cases there was a distinct act or happening in the course of the conduct of the business of the defendant, out of the ordinary routine of that business when properly conducted, upon which the presumption of negligence rests.

A very excellent review of the cases, with a discriminating consideration of the limitations of the rule of presumption of negligence in passenger cases is found in Judge Warrington's opinion in Lee Line Steamers v. Robinson, 218 Fed. 559.

See also the note in 13 L. R. A. (N. S.), p. 601.

Now, an examination of the citations furnished by the appellant shows that they are confined to instances where the accident was due to derailment or collision, or some cause exclusively under the carrier's control, or a defect in machinery, cars or track, and to circumstances under which injury would not usually occur if due care is used.

Of course if the evidence clearly shows the cause of the accident there is no presumption indulged in.

It is perhaps unnecessary for us again to call attention of the court to the fact that there is no admission in the answer of the injury complained of, as again assumed upon page 83 of appellant's brief, where authorities are cited upon this assumption.

The numerous citations in appellant's brief of cases wherein carriers under circumstances shown therein have been held negligent need not be here reviewed separately. They are cases of the falling of a berth, or faulty construction of an approach, or the use of a dangerous gangplank, or other negligence on the part of the carrier, without contributory neligence. All these numerous cases serve to show that carriers are liable for negligence. But in each case the negligence is pointed out by the court or found by the jury. After all, each case must stand upon its own facts, and such citations have only a remote bearing.

Here the facts are simple enough and the question is not what some court held upon a different state of facts, but whether this bath can be said to be so faulty as to make the steamship company liable for an injury to one who uses it so carelessly that the proximate cause of the accident was his own lack of common prudence.

### III.

THE BATH WAS MODERN AND NEW, AND OF THE USUAL DESIGN.

The ship is described as a modern vessel of 8255 tons gross and 4184 tons net, built by Cramp and Sons of Philadelphia. She left that city for the Pacific Coast, January 28, 1915, under command of Captain Ahman who was still in charge of her on February 18, 1916, when this accident happened (pp. 231, 264). The firm mentioned is said by Captain Ahman to enjoy a first class reputation, having built the Kroonland, Finland, St. Louis, St. Paul and quite a number of other large passenger ships; and "they are people that have knowledge of these things, of installing shower baths, bathrooms, and so forth, aboard ships, and know what they are doing." Captain Ahman says there are no other precautions that could be used that he knows of that would make the shower bath more safe. He has had a wide experience as shown by his testimony (pp. 443-4). At another place in his testimony he says the facilities for bathing on the "Great Northern" are absolutely the best he has ever seen. This coming from a man of forty-five years' experience at sea and on many vessels is entitled to some weight, especially when he adds that there are no other precautions which from his observation in connection with shower facilities could be used, in his judgment, to make this shower more

safe. He says the showers are used all the time by the passengers, and no complaints have been made (pp. 275-7). In this he is corroborated by Chief Engineer Morris who testifies that in his experience he has not known of any shower room or compartment that had any other facility or device which he has known or heard of that is absent from this particular compartment (p. 254). At another place in his testimony he says:

"I have been pretty much all over the world; I was running to Panama for about six or eight years, going out to China for twelve or fifteen years, and the remainder of my time from Alaska to San Francisco, Honolulu. In all the ships I have been in, and in all my experience, I never saw a ship that was better outfitted than the 'Great Northern' of the Great Northern Pacific Steamship Company for both shower-baths and everything else, none whatever.'

He says his experience has justified his forming a conclusion about that (p. 437).

He testifies that the Great Northern and the Northern Pacific had carried some 80,000 passengers and the baths were continuously used, people waiting for them, and that no complaint had been made to him as an officer of the company as to the manner of construction or the condition of the shower baths prior to the complaint made to him by Mr. Hutchins, as he had stated (pp. 255-6).

At another place in his testimony he says that they are used all the time, a continuous stream of people using them, and he has not known of any complaint being made that the bath is dangerous. Also that he cannot see himself—he would be the one to suggest an improvement if any was necessary there, and he had never felt the need of doing so (pp. 470-1).

First Officer Wall, whose duty it was to make daily inspections and on finding anything wrong, or equipment broken, to have it attended to and to report it to the head of the proper department, says that he never found anything wrong with this bath or made any report concerning it or noticed anything that led him to think this bath was dangerous in any respect; has never had occasion to make a report concerning any defect in this bath (p. 487).

And likewise Chief Steward T. S. Mills, who has general charge, oversight of the bath-rooms, says that if any accident should happen in the use of the shower baths on the ship, the attention of the purser and himself would be called to it in the natural course of the business on the ship. If it happened inside of the state rooms or showers or baths or on deck, it would be reported to the deck department, the chief officer or the captain. That no complaints have been made about these shower baths (p. 508).

None of this testimony is disputed by any evidence offered by the appellant and from the evidence it may be well believed that Capt. Ahman is correct in saying that the "Great Northern" was built very much upon the same plans as the "Lusitania" and the "Mauritania" as respects shower baths. He says that first class steamers like the "White Star," the "Cunard" and the other big liners on the Atlantic have shower baths and they are all fitted about the same in that line (p. 285).

Mr. Hutchins himself says that the material used in these baths is the same as that used in private houses (p. 158), and Dr. Simons says that the porcelain basins were the regular stock basins that you see in every plumbing store where they sell shower or bath-room supplies. He had occasion to investigate them because he intended to put them in his cottage in Massachusetts and he observed that they are the stock basin; the shower as constructed on the "Great Northern" was the usual modern type of stock basin in every particular. This includes distance from the floor and slope in the basin (pp. 566-7). This testimony may be considered in connection with the statement of the appellant (p. 174) as follows:

"Q. Can you tell what caused you to fall?

A. Why, I attribute it to the slippery condition of the floor, the slippery condition of the bowl, that is. I don't consider the bowl and

its condition one that I would want to get into again.

Q. I wasn't talking about that. What I want to find out is what caused the fall.

A. The water was running in the bowl, the steward had turned that on. The water was on the surface of the bowl, and there was,—to my knowledge there was no lurch of the ship and no movement on my part. If anything, I was leaning forward instead of upright, if there was any difference, and there was no premonition of it, it was just very quick."

The mere fact that the bath bowl or the bathroom floor may have been wet, and on this account slippery, would not make out a case of negligence in ship or owners. Thus in *The Anchoria*, 77
Fed. 994, where the claim was that the passenger
was injured by being scalded by the splashing of
some hot gruel from a bucket in which the steward
was supplying it to the steerage passengers, and
the court considered the circumstances of his slipping on the wet floor, it was said:

"But even if the steward slipped upon the wet floor, I do not think this makes out a case of negligence in ship or owners. There was nothing lacking, or improper, or unusual in the equipment; and there is no evidence of the lack of ordinary care as respects that part of the steerage. Where a water cooler is placed as customary for the common use of children and steerage passengers, it is not to be supposed that there will not be some water on the floor. That this happens is no evidence of negligence

in the ship. Nor is a little water upon the floor naturally any such source of danger, as in itself to constitute evidence of negligence, or to require an attendant to keep the floor dry. or to demand a wholly different arrangement for the water cooler. No previous similar accident from such a cause is in evidence, or known to the court. It was not to be reasonably anticipated. More or less water on deck is a constant attendant of sea voyages; but this does not ordinarily cause slipping by any of the ship's company, or accidents therefrom. The steward appears to have been a competent and careful man; and the case is, I think, one of accident proper, and not one involving any legal fault in the ship or owners."

### IV.

Rubber Mats or Gratings Not Necessary Nor Useful.

It has been claimed in this case by the appellant that there should have been a rubber mat on the floor either of the basin or of the bath-room. It is common knowledge that a rubber mat might itself be dangerous especially if wet with soapy water, and there is some testimony that it would be more so than porcelain (Testimony of Mr. Morris, pp. 258, 471). And also that rubber mats would be unsanitary. If the accident happened as appellant asserts, by his feet slipping from under him when in the bowl or basin, then a mat on the bath-room floor would not have prevented it.

# Dr. Simons testifies:

- "Q. Now, I will renew my question and ask your opinion as to the use of a rubber floor or other floor of that type in connection with a bath-room used as this was, generally on a ship? . . .
- A. I would regard the principle of sanitation more important on a steamship than I would in my home because of peculiar conditions on the steamship. I think it is much more difficult to keep a steamer in a hygienic condition than it would be in your home.
- Q. Would the fact, Doctor, of the motion of the boat in rough weather qualify your opinion as to the necessity of having rubber floor coverings, as a matter of safety in spite of your opinion on the question of sanitation? . . .

- A. Well, that is a pretty hard question for me to answer. I have traveled on a great many steamers, but I don't remember seeing rubber mats on any of them, and I don't remember hearing of anyone falling in the bath. This is the first time it has been brought to my attention.
- Q. Would you regard the use of rubber mats on the floor of a bath-room on a steamship such as the 'Great Northern' as sanitary?
- A. No, I would not regard them as sanitary as the tile floor.
- Q. In your opinion would any rubber mat provide against slipping unless it was a mat which covered the entire floor?
- A. I should say that if the mats were of good size they would help considerably. I say good sized in proportion to the size of the room.
- Q. But a small mat would provide practically no protection?
  - A. No.
- Q. You say that you have traveled extensively and that you have never seen rubber mats used on bath-room floors on shipboard?
  - A. I never have.
- Q. From your experience how would you regard the equipment of this shower bath-room, its showers, including its basins and general appurtenances, so far as you observed them on the day of the accident?
- A. I would say they are first class." (pp. 571-3.)

The appellant called a single witness to give an opinion that mats or gratings should be provided.

This witness was Alfred Hackett, chief steward of "Sierra" of the Oceanic Steamship Co. (p. 345), who has been with that company thirty years as storekeeper, second steward and chief steward. He mentioned but two ships that he knew of that had shower baths, the Sierra and the Sonoma of that line. He had no experience excepting on the ships of that line, but in response to questions by the appellant's counsel and against objection he stated that a bath of this description should have a wooden grating or a bath towel to stand on to protect the passenger from slipping. He also stated that "we protect our passengers by having a wooden grating bath-mat, and also on the outside dressing-room when he comes out of the shower he stands on this platform of wood with a bath-towel on it to prevent him from slipping while he is wiping himself and dressing himself." (p. 356.)

But we submit that this opinion and comparison, if admissible at all, is insufficient to overcome the mass of evidence to the contrary. The practice upon the two steamers of the Oceanic line is not shown to have been known to the Great Northern Pacific Steamship Company or the officers of the "Great Northern." The practice mentioned by the witness is not claimed to have been so general as to be common usage, and other witnesses have said that they have traveled on many ships and have not known the use of rubber mats in such baths, and they do

not mention having seen or heard of such gratings. The method employed is manifestly more unsanitary, and nothing in the testimony shows there is such necessity for the use of gratings as would overcome the undisputed evidence of frequent and constant use of the "Great Northern" shower baths without accident, although not provided with such gratings.

The witness Hackett could hardly qualify as an expert. He did not notice the showers on the Union Steamship Company vessels nor others, nor know anything of Atlantic vessels, as he had not been on the Atlantic for 35 or 40 years. He admitted that the most he could do was to tell the conditions which existed on his own vessel and said that he had never made a study of construction. He also said that he had never seen the showers used on the "Sierra" without the gratings and of course therefore could not speak from experience as to the use in practice of such shower bath-rooms as are on the "Great Northern." (p. 345.)

This is the only evidence in the record that is relied upon by the appellant to prove that mats or gratings should have been supplied in the basins.

That the surface of a wet rubber mat would be slippery in a shower bath basin and a real danger in itself seems plain enough, and that such a mat would have a tendency to slide on tiling or in a porcelain bowl may be assumed as common knowledge. An illustration is found in a case in the Second Circuit, cited by the appellant, where it was held that the mat at a doorway being too small to properly fit the space provided for it, the steamship was liable to a passenger for personal injuries occasioned by the mat slipping.

Mohns v. Steamship Co., 182 Fed. 323.

Had a slipping mat been placed in this basin accidents from this source would be frequent for manifestly they could not be made so they would not slip.

Or the mat might have caused the passenger to trip and fall as in *The North Star*, 169 Fed. 711.

A mat is a simple contrivance, and its usefulness in this particular bath-room, or as claimed in the libel in the basin of the bath itself, is a matter of judgment or opinion. Certainly under the evidence there is nothing to justify holding it negligence to have formed and acted upon the opinion or judgment that a rubber mat should not be used. It would be more or less of a trap to the unwary in such a place on shipboard, and if used would give just ground for complaint on that account as well as for sanitary reasons.

## V.

FACILITIES TO SAFEGUARD AGAINST ACCIDENT.

Some responsibility must rest upon the shoulders of passengers of mature years, like Mr. Hutchins, who may be expected to use their judgment upon what is obvious.

In Savage v. New York, N. & H. Steamship Co., 185 Fed. 779, a passenger was injured by falling over an obstruction on the promenade deck. The obstruction was obvious, and the light was ample so that by use of ordinary human faculties she could have noted the obstruction and have avoided the accident; and the court held that which is obvious to one of ordinary intelligence and in the possession of physical senses does not require special warning.

The steamship company is not an insurer, and some risks of travel must be assumed by the passengers. Such ship motion as was incidental to proper operation, is assumed by the passenger, and would not charge the appellee.

Chesapeake & Ohio Ry. Co. v. Needham, 244 Fed. 146.

The libel alleges that "there was no provision by means of rails or otherwise for grasping or holding on in case of slipping." (p. 16.)

Mr. Hutchins insisted throughout the trial that a certain grabhandle that is shown by the photographs at the back of the shower bath compartment was not there at the time of the accident, and we will devote section VI of this brief to the evidence upon that point, to show that in this he is mistaken.

Passing that for the moment, we will here attempt to show that a person wishing to use the shower in question might, with common prudence, have taken advantage of a number of other visible, possible, and convenient facilities, and so avoided any chance of accident.

Mr. Relf, the claim agent, under whose directions the photographs were taken, and who gives a description of the shower bath from actual measurements taken by him, was asked:

- "Q. Entering the shower bath what facilities present themselves to a person desiring to take a bath to safeguard from falling?
- A. There is a marble slab on his right hand, a rod which is above him about 72 inches from the floor; the three pipes that are on his left hand; the first pipe is a cold water pipe; he could catch hold of that; and then by reaching over to the grab on the back wall of the shower bath, I would say that would be the best means of protecting himself or steadying himself while stepping into the receptor.
- Q. How about the door-knob that you speak of; is that available?
- A. It is available; it could be used for that purpose.
- Q. The basin of the bath you say is about 30 inches square?

- A. The outside dimensions is 30 inches.
- Q. Where is this overhead pipe that you speak of, 72 inches above the floor; is that at the forward part of the bath as you enter?
  - A. That is right at the opening.
- Q. What about the curtain that hangs there—is there a curtain?
  - A. Yes.
  - Q. That slides on rings, does it?
  - A. Yes.
- Q. What would you say, Mr. Relf, as to whether or not a person could if he wished take hold of the curtain itself?
  - A. Yes, he could.
  - Q. What material is that curtain made of?
- A. It seems to me it is a cloth treated in some way to make it waterproof; almost a coating of rubber on it; I do not think it is rubber; it is not a rubber curtain." (pp. 456-7.)

A somewhat similar enumeration and description is given by Chief Steward Mills who had general charge of these baths. (See page 506.)

Slab: Mr. Jamieson, a passenger, was asked if it would be practicable for a person using the bath to take hold of the slab to steady himself if he found it necessary to steady himself, and answered that a person could so steady himself on going into the bath. (p. 480.)

Chief Officer Wall said as to this slab:

"Well, in stepping into the shower, it seems to me the first thing that a person would take hold of; naturally, a man will put his hand up and touch that slab or hold on to it in stepping into it; I think that nine men out of ten would do that without any conscious effort or thinking about it." (p. 485.)

Captain Ahman says the slab is one and a half inches thick, and is available to take hold of (p. 446).

This slab is plainly shown on Claimant's Exhibit No. 1 at the right of the picture. (p. 543.)

Door Knob: On approaching the bath, there was on the left hand side a brass door knob which was conveniently near and forms a convenient support against slipping. This is shown in Claimant's Exhibit No. 2, (p. 544). (See testimony of Capt. Ahman, p. 441; Morris, pp. 241, 246, 467; Wall, pp. 484, 493.)

Curtain: There was a heavy curtain in front of the bath suspended by rings from a strong rod over the entrance. This curtain was a cloth treated to make it waterproof, but was pushed to the side at the time when the appellant was making use of the shower bath, as he testified (p. 176). It hung, however, conveniently and might readily have been availed of as a means of support had the appellant cared to make use of it. (See Claimant's Exhibits Nos. 2 and 3 where the curtain is shown on the righthand side of the pictures; see also testimony of Relf, p. 463.) Chief Engineer Morris says these curtains are strong enough to hold the weight of a person. (p. 246.)

Curtain Rod: And moreover the rod or bar just mentioned afforded excellent support and protection, as it was heavy and strong enough for the purpose. The appellant (Br. p. 53) alludes to the absurd opinions of the officers that this curtain rod was available for this purpose. It is well shown in Claimant's Exhibit No. 3 at the top of the picture and is less clearly shown in Claimant's Exhibit No. 1 (pp. 545 and 543). Chief Engineer Morris says this rod is one and one-half inches in diameter, secured by bolting on the marble slabs and will sustain the weight of a man of his own size, over two hundred pounds, easily. (p. 299.) And the passenger Lowenthal, said that in using the bath every morning he made use of this rod. (p. 501.) (See also passenger Jamieson, deposition, p. 480; Wall, p. 491; Metzler, p. 216).

Water Pipes: Again, the water pipes at the lefthand side of the shower bath and firmly attached to the wall, afforded excellent means of support. These are clearly shown in Claimant's Exhibits 1, 2 and 3 (pp. 543, 544, 545). These pipes were considerably longer than any grab handle or railing. Mr. Wall says:

"These water pipes are about the height, we will say, of five feet, I imagine, from the floor, and quite easy to be taken hold of in en-

tering the bath; in case of a man losing his balance, I think it would be the first thing he would catch hold of with his left hand." (p. 485.)

They stood out from the wall about two and one-half inches (Morris, p. 245), although the appellant thought they were so close to the wall he could not get his fingers behind them. (p. 126.) The outside or nearest pipe was a cold water pipe. (Morris, p. 321.) Mr. Relf, p. 457; Mr. Metzler, p. 217, and Wall at pp. 491, 492, all testify that these pipes were so located as to be of use as a support.

Valve Handle: The valve handle or lever at the bottom of these pipes would also afford a ready hold for anyone on entering the compartment. (Morris, p. 467; Jamieson, pp. 478-481; Stoy, pp. 533-5.) This valve handle is clearly shown in each of the photographs and particularly in Claimant's Exhibits 2 and 3, pp. 544 and 545. The passengers Jamieson and Stoy both said they relied upon this handle when using the bath.

In view of these facts, which are undisputed and which the photographs verify, it would seem the claim of the appellant that the shower bath was not provided with sufficient facilities to enable a person to take hold and safeguard against slipping, is unfounded. The court viewed the matter otherwise after personal examination, and we may assume that the finding on a fact of this kind will be accepted on appeal in an admiralty case. Common prudence would require a person in stepping into a marble porcelain bath to make use of such facilities when they were plainly apparent. In discussing these facilities we have so far purposely omitted reference to the grab handle at the back of the bath.

Controversy arose respecting this particular facility on the trial, due to the fact that Mr. Hutchins claimed that there was no such grab handle, and he was to some extent corroborated by the positive testimony of two witnesses and the negative testimony of two other witnesses who had no recollection of seeing it. We now propose to show, however, that the overwhelming evidence establishes the fact that this grab handle was in place, as shown by claimant's exhibits Nos. 1, 2 and 3, pages 543. 544, 545, firmly attached to the marble slab forming the back of the bath, in plain sight, and affording a firm hold. This handle had an inside measurement of about six inches and was nine inches over all, as testified by the man who installed it (p. 520).

The assertion is made by appellant in his brief (p. 73), that all the disinterested witnesses in the case either swear positively that the handle was not in place at the time of the accident or express a doubt as to its being there. But this statement, to put it mildly, is a mistake.

#### VI.

THE GRAB HANDLE AT THE BACK OF THE BATH.

In the first place before the Great Northern was fitted out for the Honolulu service, a requisition was made out by the chief steward of the steamship, Thomas S. Mills, dated January 20, 1916, to have grab handles installed in all shower baths on this ship. (See his testimony, pp. 324 to 331.) Mr. Mills produced the original requisition. (See Libelees' Exhibit No. 1, pp. 59-62.) This is Great Northern Requisition No. 27 for repairs to be made at San Francisco. The date will be found at the end of the document at page 62. In the description of articles to be furnished is the following: "Grab Irons in all Shower Baths." (p. 59.) Mr. Mills testifies that after the completion of the work he examined the bath personally and knows that the grab handle in this particular shower bath was in the location as shown on the photographs on January 25, 1916 (pp. 325-6). He also says that the work was done by a San Francisco firm, Messrs. Muir and Symon, and their bill is now attached to the requisition; that the bill was marked by him in the left-hand corner, "O. K., T. S. Mills, chief steward," on January 25, 1916 (p. 328), after he personally checked the items and inspected the work, and the bills were vouchered for payment on February 21, 1916 (p. 327). On the day of the accident

he was in this bath room and the handle was there at that time (pp. 329-331).

The bills of Muir & Symon are found at pages 51 to 59. The job was given the number 86 in their shop.

Reference to these bills shows they are dated January 25, 1916 (see p. 51), and shows, among others, the following item: "Grab Bars in all Shower Baths." (p. 53.)

That the grab handle was placed in this shower bath prior to the accident, is shown by the following witnesses:

W. J. Tomlin (p. 512) testified that he put these handles on the baths in January, 1916, and to fix the exact dates produces his time cards made out at the time. (See pp. 513-4, and also see Claimant's Exhibits 5 and 6, set out on page 548.) In Exhibit No. 5 is the item "drilling marble in shower baths, using electric drill 4 hours." This is on job 86, which was the shop number for all these repairs. Likewise at the bottom of Claimant's Exhibit No. 6 is the item "handles in shower baths, 1 hour." This is also on job 86.

The time cards were made on finishing the day's work, and were turned into his employer's office. They are in the witness' handwriting and are dated the 24th and 25th of January, respectively, and the signature thereon is his own signa-

ture. They were made up for the purpose of showing the time spent on the different jobs, whether aboard boat or ashore, so that the firm could charge up in the office the time and material on the job (p. 514). He is positive by reference to these time cards that the time he did the work was on January 24 and January 25, 1916 (p. 514).

Effort by appellant's counsel to show that the work had been done on the sister ship, the "Northern Pacific," instead of on the "Great Northern," failed, as the witness Tomlin said that the cards were certainly for the work done on the "Great Northern," and that the initials "N. P. S. S." on Claimant's Exhibit No. 5 were not in his handwriting. This particular job on the "Great Northern" had the shop number, and was called Job No. 86, and this number appears on the bills and requisition (see p. 518).

In appellant's brief the statement is made that "The court below laid great stress upon the evidence of this witness but the facts show that he was probably mistaken, and point strongly to the work having been done on the 'Northern Pacific' and not on the 'Great Northern.'" On the contrary the work on the "Northern Pacific" of similar character bore a different shop number and was done at a different pier and some weeks after the date of these requisitions, time cards, bills and book entries that are undisputed, and the sworn testi-

mony of this witness that the initials "N. P. S. S." on the time cards was a mistake is corroborated by other witnesses as well as by the records, and is not disputed by any witness.

Then there was the testimony of J. B. Switzer, foreman for Muir & Symon, ship fitters, who testified that he received a duplicate of the requisition from his employer, Mr. Muir, who made duplicates of it and handed witness one of these duplicates. He says that he went down to the boat and saw what was wanted and ordered the handles made at the foundry, and instructed Mr. Tomlin to drill the holes and have everything ready so when the handles came they would be ready to be put on, at the place. He testifies positively that the handles were placed in January at the date shown on the time cards. The work was performed under his direction, and it was his duty to see that the work was ready to be put up and to get the work under way, and also to go over the work after it was finished and see that it was done properly (p. 523).

This testimony is also corroborated by Miss Katie Schnieder (p. 527). Miss Schnieder was bookkeeper for Muir & Symon. She says that the job on repairs on the "Great Northern" was known in the office of Muir & Symon as Job No. 86 and all of the bills and vouchers bore that number. She produced certain voucher sheets made in her own handwriting covering the work on the steamship

"Great Northern" included in the requisition above referred to. On request the witness marked with a check mark the items on January 24 and January 25 relating to these handles. The sheets are the Voucher Sheets, Claimant's Exhibit No. 7, set out in full, beginning at page 549. At about the middle of page 549 is the item under date January 24, "W. Tomlin, Drilling Marble in Shower Baths, Using Elec. Drill," and at the foot of page 550 under date January 25, is the item, "W. Tomlin, Handles in Shower Baths." This witness made copies of the requisition for this work and offered the same in evidence (Claimant's Exhibit No. 8, p. 552), being a list of repairs and improvements in steward's department in steamship "Great Northern," the next to the last item of which on page 553 is "Grab Bars in all Shower Baths." This requisition also bears the number 86.

The items referred to by this witness in Claimant's Exhibit No. 7 were written by her from day to day after the time cards were turned in for the items, and the items concerning the drilling marble in shower baths, January 24 and 25, were placed by her on this exhibit on different days. She also testified that the work there shown was not done for the "Northern Pacific" as the work for that ship was done under a different order number, two or three weeks later (pp. 532-3).

Further corroboration is found in the deposition

of Samuel Symon (p. 536) of the firm of Muir & Symon, who says that the work of placing these handles in the shower baths was done from January 20 to January 25, 1916. He attended to the purchase of these handles himself. He had the pattern-maker at Garratt's make a pattern. He got the handles cast at Garratt's brass foundry (p. This was W. T. Garratt & Co. of San Fran-536). That firm billed on Muir & Symon for the cisco. The receipted bill is Claimant's Exhibit No. 9 (p. 554), and is dated January 25, 1916. It shows among other items, "10 nickel plated pulls" at the price \$5.92, and the item is marked with the job number 86. He also purchased the screws or bolts that were necessary in fastening these handles from C. W. Marwedel. The bills for these are Claimant's Exhibit No. 10, set out on pages 555 and 556, on which pages will be found the items for 50 R. H. brass screws and 16 R. H. brass wood screws. These items also bear the job number of the Muir & Symon job, number 86, and the bills are dated January 24-25, 1916. The witness recalled in connection with these bills that the foreman on the job (Switzer) told him that he did not have long enough screw fastenings, that he only had screws that would go in half an inch and "asked me if he should let it go, and I said no; I immediately turned around and went up town and got 16 more screws one-half inch longer to make them more secure."

(p. 538.) These are the 3½-inch screws in the second of the Marwedel bills, dated January 25, 1916 (p. 556). The witness testifies that bill was rendered to the Great Northern Pacific Steamship Company by his firm, dated January 25, the date the job was finished. The firm also did similar work on the steamship "Northern Pacific" about a week after, and this job was No. 140. The witness personally knows that these grab handles were put on at the time mentioned (p. 541).

Further corroboration is found in the testimony of bath steward Gould who had charge of the shower baths on B Deck of the "Great Northern." He testifies positively that the handle was in the shower room of the C baths prior to the time Mr. Hutchins was hurt. Before the time for the ship to sail to Honolulu the witness visited the shower bath room on the C Deck. He says positively that these handles were in place in this shower bath before the ship sailed, and he states the reasons for knowing this which reasons are most convincing (p. 293-4).

Chief Engineer Morris inspected the shower bath the next day after the Hutchins accident and was absolutely sure that the handle was there (p. 242). He says that Mr. Hutchins told him the evening before that he had slipped and hurt his shoulder, and that he "took a look at the place." He also says that Mr. Hutchins did not mention any han-

dles or any method of holding on at all, just the fact that the base of the bath was built with a round corner and it should have square corners. (p. 244.)

Capt. Ahman testifies that he is positive the grab handle was on the back wall of the bath at the time of Mr. Hutchins' accident, and he explains circumstances that tended to fix in his mind the time when the work was done in conjunction with some other work upon the ship. (pp. 271-2.) He himself saw the man putting up the grab irons.

Further corroboration is found in the testimony of W. H. Metzler, who was special agent of the company, employed upon the ship. It was his business to make an examination after an accident, and on learning of the accident he went down immediately and examined the shower bath. He testifies positively that the grab iron was in place at that time (pp. 213-214).

Chief Officer Charles Wall testifies to similar effect (p. 483) and says that it was his duty to make inspections every day, "if we find anything wrong, or equipment broken, we have it tended to, and report it to the head of the proper department." (p. 487.) He says that the handle was as shown upon the photographs, Claimant's Exhibits Nos. 1, 2 and 3, at the time of the accident.

Claim Agent Relf testified that he made an examination after the accident on the arrival of the

ship at San Francisco on her return voyage, and found the grab handle as located. When he heard that Mr. Hutchins made claim against the Steamship Company on account of having received injuries, he investigated for the purpose of ascertaining the facts in connection with the accident (p. 454), and on return of the ship from Honolulu after February 18, 1916, he made an examination of this shower bath. He has seen the shower bath as often as once a month since that time (p. 459).

Dr. Robert J. McAdory corroborated this at page 383. He saw the shower bath room the day Mr. Hutchins fell, sometime after the accident. He says positively that the grab handle was there on that day.

This is further corroborated by the testimony of Sam B. Stoy, a passenger, and disinterested witness, who used the bath on this same voyage. (p. 535.)

The foregoing evidence seems to be positively overwhelming proof of the fact. It comes as near demonstrating absolutely that the grab handle in question was in place at the time of the accident as is possible for human testimony.

However, Mr. Hutchins testified repeatedly that there was nothing whatever for him to take hold of. (pp. 76, 77, 79, 82, 127, 165.) Mr. Hutchins went further and said that as long afterward as the

middle of March he visited the vessel when it was again at Honolulu, that he went on board the ship to see if any handles or projections were there and that he was positive none were there even then, and that no handles were there on two other visits after that when he went again on board for the same specific purpose. (pp. 96, 127, 164, 165.) The credibility of this testimony, however, is much impaired from the fact that Mr. Hutchins also testified in the same connection that there were but two water supply pipes, on the left wall of the compartment (p. 159), and these he said were tight against the wall and there was no room for a man to take hold of the pipes in his hand as the fingers could not pass behind them. (pp. 78, 126, 127.)

Reference to the photographs (Claimant's Exhibits 1, 2 and 3), will show that these three pipes are parallel, with the center one most prominent, and the photographs also show that these pipes were sufficiently out from the wall for a man to put his hand around any of them, as indeed is testified to by other witnesses. (Metzler, p. 216; Morris, p. 245.)

Mr. Hutchins, however, was supported in his testimony that there was no grab handle at the back of the bath by a former room steward on the ship, named Lefebre, who at the time he testified was no longer employed upon the ship. His employment on the ship gave him no

duties in this bath-room, but he was room steward in the Chief Engineer's room. He testified that when Hutchins came on board the steamer the second trip after the accident, in March, he went with him into the shower compartment on C Deck and saw that there was no grab handle on the wall. (Lefebre deposition, p. 597.) The unreliability of this witness, however, is distinctly shown by his cross-examination, and furthermore by his being directly disputed on material points in his testimony by Chief Engineer Morris, and the weight to be given to his testimony, taken as a whole, is very slight.

The witness had said that he went to Chief Engineer Morris on board and told him of the visit to the bath-room made by himself with Hutchins, and that thereupon Morris went with him to the same bath compartment and verified the fact that there was no such handle there (pp. 597-8). This is most explicitly and absolutely denied by Morris (pp. 260, 304, 305, 608-9).

That this testimony of Lefebre is a story manufactured out of whole cloth will be evident from a comparison of his cross-examination with the testimony of Mr. Morris beginning at page 607 in which the latter completely disposes of his false testimony. (See also Morris, pp. 260 and 304.)

However, in addition to Lefebre, Hutchins was corroborated by the witness Wescott, a citizen of Honolulu. Mr. Hutchins stopped with this witness at his house. The witness said that he visited the ship together with a Mr. Bicknell, knowing of Hutchins' accident, but not at the latter's request (p. 211); and that there was no handle there at that time, which was in March, 1916 (p. 205). It is noticeable in connection with this witness' testimony, however, that the Mr. Bicknell referred to was not called to corroborate, nor was any explanation given of the failure to produce him, a failure which under the rules of evidence raises a presumption against the appellant on this point.

The claim of Hutchins in this respect may also be said to have been negatively supported by the testimony of two of the appellee's witnesses who were passengers and who used the bath-room. Witness Lowenthal did not remember any hand-hold on the marble wall at the back of the shower, but he said that in using the shower bath he faced outward so that his back was to the back slab and he held on to the rod over the front. He did not say there was no grab handle there, and all that his testimony in this respect amounts to is that he could not remember (p. 503). And the witness S. W. Jamieson, who used this shower at least three times on the same trip to Honolulu, and also on his return trip, said that he could not say as to whether it was there or not at the time, as he had no occasion to use it (p. 481).

To summarize, therefore, as to this grab handle, we have at least 12 witnesses saying that it was there and 5 witnesses either saying that it was not there, or that they did not notice it. We have the strong documentary evidence supporting the testimony of the men who actually placed it there. In relation to this the trial court said:

"It is a well-known rule of law that affirmative statements are entitled to more weight than negative, even when the makers of the statements are equally creditable, equally disinterested and equally certain and positive that their statements are true. A witness may swear positively that a hand-hold was not on the wall of a compartment at a certain time and think his statement is true, and yet it may be untrue; he may not have observed the hand-hold; but when a witness swears positively that a hand-hold was on a compartment at a certain time, that he saw it and knows it was there, if his statement is untrue, no such explanation of it can be made." (p. 657.)

In leaving this topic we will say that the somewhat full review of the evidence bearing on the presence of this handle in the shower bath has seemed to be called for because of the claim made by the appellant on the trial and in his brief, although it has seemed that in view of his admission that he did not have his glasses on and could not see very well without them he would not have seen the handle anyway (p. 166), and if his own story is to be accepted and he had his arms under the

falling stream feeling the water when he was stepping into the basin, and did not attempt to find anything to take hold of before putting his feet in the basin, a grab handle would have been of little use to him.

#### VII.

#### THE CLAIM FOR DAMAGES.

The appellant made large claims for losses in his business by reason of being obliged to remain in Honolulu on account of the accident. His proof on this subject is very meager and on cross-examination and by the testimony of independent witnesses these losses were shown to be imaginary.

We will first discuss his claim for general damages on account of pain and suffering. Apparently he did not consider his injury very serious. was not confined to his bed, and he followed his usual habits about the ship, and after landing did not allow it to interfere with his movements, except that he went occasionally to the doctor. When first apprised of the accident the ship's physician, Dr. McAdory, advised him to lie down, but he got up as soon as the doctor's back was turned, dressed and went down to breakfast. He took his breakfast at his usual place at the table. (McAdory, pp. 373-4.) He met the doctor on the ship every day but he did not think it was his business to ask him to make any further examination and told the doctor he felt fairly well. (Hutchins, pp. 162-3.)

Arrived at Hilo, with a day to spend from 8:30 A. M. until midnight, he made no attempt to see any doctor at Hilo. (pp. 87, 88, 163.) Although testimony shows that three doctors at least reside there (Morris, p. 309). In fact, he went out to the Olaa

plantation for the day (pp. 108, 164), and the evidence discloses that he went there on a business errand to further negotiations for a desired molasses contract.

Although his counsel sought to show that neither the captain or officers paid him any visits or attention (pp. 87, 96), he himself admits that he did not report the accident to the captain (p. 164). There was another doctor on board and he was satisfied merely to have some advice from him. (p. 94.) On the evening of the accident he presided as a judge at a mock divorce trial to the entertainment and edification of the passengers (pp. 87-8). From various circumstances shown in the case he seems to have suffered little and to have conducted himself as usual and without particular regard to his injury.

Now as to special damages for interference with his business, his claims in this respect were thoroughly discredited and he is shown to have been actively engaged in prosecuting his business during the period of his stay on the Islands.

His business at Hilo was to arrange for putting in foundations for a storage tank. He employed the men to take charge of it, and arranged for contracts for the leveling of the site. (Hutchins, pp. 106-7.) He claims he was in a hurry to get back to San Francisco, but although his bandages were off

by March 18 or 20, he did not sail until April 5 (pp. 119-121), and it appears that he was staying on purposely to transact business which he claims was his principal business, viz.: the purchase of molasses. Honolulu is one of his principal sources of supply and he went there for that purpose (pp. 102-4). The evidence also shows that throughout March and April he was still negotiating for molasses contracts, and even opened new negotiations in April (p. 111). As a result of these negotiations he subsequently obtained valuable molasses contracts from F. A. Schaeffer & Company, Limited, and Castle and Cooke, Limited (Waldron, pp. 412-4). Efforts to obtain contracts from Alexander and Baldwin in March were unsuccessful (p. 406). Later on he returned to Hawaii to complete his business (Hutchins, pp. 112-115). When he cashed in the return coupon of his steamer ticket he gave business reasons as preventing him from making the return trip as planned and he said nothing about the accident preventing him from returning (see testimony of Waldron, p. 412, Waterhouse, p. 406). His salary as manager of his Land Company was not interfered with. He claimed important contracts at San Francisco were interfered with by his enforced absence, but failed to specify any of them or show any upon which damages could be considered (pp. 114-15).

#### VIII

LIABILITY FOR NEGLIGENCE OF SHIP'S PHYSICIAN.

Dr. R. J. McAdory was engaged by Marine Superintendent Wiley after careful inquiry into his qualifications and upon strong written recommendations of W. H. Avery, Assistant General Manager of Oriental Steamship Company; Philip Mills Jones, Secretary of the Medical Society of the State of California; and E. Anderson, Master of Steamship "Honolulan." (Libelee's Exhibits 2, 3 and 4, pp. 62-65.) He had a certificate from the secretary of the Medical Society of the State of California that he was regularly licensed, a graduated physician favorably known.

The testimony of Mr. Wiley shows the investigation made as to his qualifications and competency. (pp. 635-643.) Besides talking with the applicant and getting his statement of his experience and considering his written credentials, he talked with Mr. Cook who gave him a very good recommendation. Captain Wiley testified:

"Dr. R. J. McAdory made a written application to me for the position, stating what ships he had been in. He mentioned the Toyo Kaisha Company, commonly called the T. K. K. Company; also presented letters from the Palace Hotel and from the Medical Society of California and from Captain Anderson of the S. S. 'Honolulu.' Personally I was very well acquainted with C. W. Cook, the Pacific Coast Manager of the American-Hawaiian Steam-

ship Company, the owners of the S. S. 'Honolulu,' and I personally went to Mr. Cook's office and asked him about the record and services of Dr. McAdory while in their employ on the S. S. 'Honolulu,' and he gave me a very good recommendation of him, stating that his services had been entirely satisfactory. Cook has been connected with the American-Hawaiian Steamship Company as their Pacific Coast representative for a period of practically ten years to my knowledge. Mr. Black of the Bank of California in San Francisco, also came to me recommending Dr. McAdory, stating that he, Mr. Black, had been a passenger on the S. S. 'Honolulu' on a trip from San Francisco to New York, and that he could recommend Dr. McAdory very highly as a ship's surgeon. He stated that Dr. McAdory had attended to himself and his folks and that he felt that the doctor was a very reliable and competent man. Both of these gentlemen being personal friends of mine, I took their recommendations to a much greater degree than one ordinarily accepts the usual recommendation. I also asked Dr. McAdory if he had a certificate permitting him to practice in California, or a license for California, and he answered in the affirmative.

"I think the application referred to in this answer is in the files of the marine superintendent's office at Pier No. 7, San Francisco,

California." (pp. 636-7.)

Captain Ahman and Chief Engineer Morris, as well as Dr. McAdory, supplement this evidence (278-81; 313; 360-8), and there is no attempt to dispute it in this record. The evidence shows that the doctor had a good training and a wide range of

experience of twenty years, and that no complaints or criticisms had been made about him.

Errors of judgment of this doctor would not render the vessel liable.

Without doubt the treatment of Mr. Hutchins by this doctor was such as he believed to be proper, and in fact the treatment under the circumstances of the case may well be claimed upon the whole evidence to have been proper. But it seems unnecessary to go into this subject and to examine the testimony, in view of the well settled rule of law that governs in cases of this character.

Apparently the appellant in his brief confuses the question of liability for furnishing an incompetent physician with the question of liability for mistake of judgment or wrong treatment of a particular case. The physician himself would not be liable for an honest mistake in diagnosis or treatment, much less the steamship. The exact character of the injury was obscure and it required X-ray photographs to determine that the neck of the humerus in the shoulder joint was broken, and that there was more than a contusion, or wrenching of the joint.

The statute requiring certain steamships to carry a duly qualified and competent surgeon or medical practitioner seems to have no application. There is no claim in this record that this steamship was bringing in emigrant passengers.

22 U. S. Stat. 186, Sec. 5.

U. S. Comp. Stat. (1916), Sec. 8002.

The City of St. Louis, 238 Fed. 381.

But the record shows that all the regulations of that statute were observed and a surgeon or medical practitioner was employed and was carried on the ship's articles, and hospital accommodations and medicines were provided.

The responsibility of the ship, whether imposed by law or by voluntary assumption of the duty of furnishing a doctor on board, would go no further than to require reasonable effort to employ a competent man. The errors or mistakes or negligence of a ship's doctor in caring for a passenger are not imputable to the ship where it was not guilty of negligence in selecting him.

The Napolitan Prince, 134 Fed. 159.

Allen v. State Steamship Co., 132 N. Y. 91; 30 N. E. Rep. 482; 28 Am. St. Rep. 556; 15 L. R. A. 166.

O'Brien v. Cunard Steamship Co., 154 Mass. 272; 28 N. E. Rep. 266; 13 L. R. A. 329.

Laubheim v. Steamship Company, 51 N. Y. Super. Ct. (19 Jones & S.) 467, and 107 N. Y. 228; 13 N. E. Rep. 781; 1 Am. St. Rep. 815.

The C. S. Holmes, 209 Fed. 971.

And this is the rule of law applicable to other carriers.

Secord v. St. P. M. & M. Ry. Co., 18 Fed. 221.

We quote from Allen v. State Steamship Company:

"When the ship-owner has employed a competent physician, duly qualified as required by the law, and has placed in his charge a supply of medicine sufficient in quantity and quality for the purposes required, which meet the approval of the government officials, and has furnished to the physician a proper place in which to keep them, we think it has performed its duty to its passengers; that from that time the responsible person is the physician, and errors and mistakes occurring in the use of the medicines are not chargeable to the ship-owner: and that no different rule is applicable to such mistakes as are the result of improper arrangement in the care of the medicines than to those which are the result of errors in judgment. The work which the physician does after the vessel starts on the voyage is his, and not the ship-owner's. It is optional entirely with the passengers whether or not they employ the physician. They may use his medicines or not, as they choose. They may place themselves under his care, or go without attendance, as they prefer, and they determine themselves how far and to what extent they will submit to his The captain of the control and treatment. ship cannot interfere. The physician is not the ship-owner's servant, doing his work and subject to his direction. In his department, in the care and attendance of the sick passengers. he is independent of all superior authority except that of his patient, and the captain of the

ship has no power to interfere, except at the passenger's request. These views find support in Laubheim v. DeKoninglyke N. S. M. Co., 107 N. Y. 229, and O'Brien v. Cunard S. S. Co., (Mass.), 10 R. R. & Corp. L. J. 309. The first case arose before Congress had legislated upon the subject, but it was said in the opinion that 'if, by law or by choice, the defendant was bound to provide a surgeon for its ship, its duty to the passengers was to select a reasonably competent man for that office, and it is liable only for a neglect of that duty.' The Massachusetts case was decided upon a statute of the United States similar to that of Great Britain, and it was there said that the shipowners 'do their whole duty if they employ a duly qualified and competent surgeon and medical practitioner, and supply him with all necessary and proper instruments, medicine, and medical comforts, and have him in readiness for such passengers as choose to employ him.' We think that is the extent of the requirement of the statute in this case, and, if there was any common-law liability resting upon the defendant to make provisio for the care and attendance of its passengers when sick, it was no greater than that imposed by the statute."

Allen v. State Steamship Co., Vol. 15, Lawyers' Reports Ann., p. 168 (N. Y.).

Respectfuly submitted,

CHARLES H. CAREY,

JAMES B. KERR,

Proctors for Appellees.

### INDEX.

## Points and Authorities.

	Page
I.	
II.	Presumptions Upon this Appeal 25
	The Hardy, 229 Fed. 985.
	Peterson v. Larsen, 177 Fed. 617.
	Perriam v. Pacific Coast Co., 133 Fed. 140.
	The Oscar B., 121 Fed. 978.
	Alaska Packers' Association v. Domen- ico, 117 Fed. 99.
	Jacobsen v. Lewis Klondike Expedition Co., 112 Fed. 73.
	Puget Sound T. L. & P. Co. v. Hunt, 223 Fed. 952.
	Midland Valley R. Co. v. Conner, 217 Fed. 956.
	White v. Chicago G. W. R. Co., 246 Fed. 427.
	Sweeney v. Erving, 228 U. S. 233, 33 Sup. Ct. 416.
	13 L. R. A. (N. S.) 602 and cases collected in note.
	29 L. R. A. (N. S.) 808 and cases collected in note.
	1916 (C) L. R. A. (N. S.) 364 and cases collected.
	Wyatt & Pac. Elev. R. Co., 156 Cal. 170; 103 Pac. 892.
	Southern Pac. Co. v. Cavin, 144 Fed. 348, 351.
	Irvine v. Delaware L. & W. R. Co., 184 Fed. 664.
	Lee Line Steamers v. Robinson, 218 Fed. 559.

### INDEX—Continued

	P	age
III.	THE BATH WAS MODERN AND NEW, AND OF USUAL DESIGN	36
	The Anchoria, 77 Fed. 994.	
IV.	RUBBER MATS OR GRATINGS NOT NECESSARY NOR USEFUL	42
	Mohns v. Steamship Co., 182 Fed. 323. The North Star, 169 Fed. 711.	
V.		
	DENT	47
	Savage v. New York, N. & H. Steam- ship Co., 185 Fed. 779.	
	Chesapeake & Ohio Ry. Co. v. Needham, 244 Fed. 146.	
VI.	THE GRAB HANDLE AT THE BACK OF THE	
	Ватн	54
VII.	THE CLAIM FOR DAMAGES	68
VIII.	LIABILITY FOR NEGLIGENCE OF SHIP'S PHY-	
	SICIAN	71
	22 U. S. Stat. 186, Sec. 5; U. S. Comp. Stat. (1916), Sec. 8002.	
	The City of St. Louis, 238 Fed. 381.	
	The Napolitan Prince, 134 Fed. 159.	
	Allen v. State Steamship Co., 132 N.	
	Y. 91; 30 N. E. Rep. 482; 28 Am. St. Rep. 556; 15 L. R. A. 166.	
	O'Brien v. Cunard Steamship Co., 154	
	Mass. 272; 28 N. E. Rep. 266; 13 L. R. A. 329.	
	Laubheim v. Steamship Company, 51	
	N. Y. Super. Ct. (19 Jones & S.)	
	467, and 107 N. Y. 228; 13 N. E. Rep. 781; 1 Am. St. Rep. 815.	
	The C. S. Holmes, 209 Fed. 971.	
	Second v. St. P. M. & M. Ry. Co., 18	
	Fed. 221.	

## United States

## Circuit Court of Appeals

For the Ninth Circuit.

J. R. THOMPSON, as County Treasurer of Flathead County, Montana,

Plaintiff in Error,

VS.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,

Defendant in Error.

## Transcript of Record.

Upon Writ of Error to the United States District Court of the District of Montana.



## United States

## Circuit Court of Appeals

For the Ninth Circuit.

J. R. THOMPSON, as County Treasurer of Flathead County, Montana,

Plaintiff in Error,

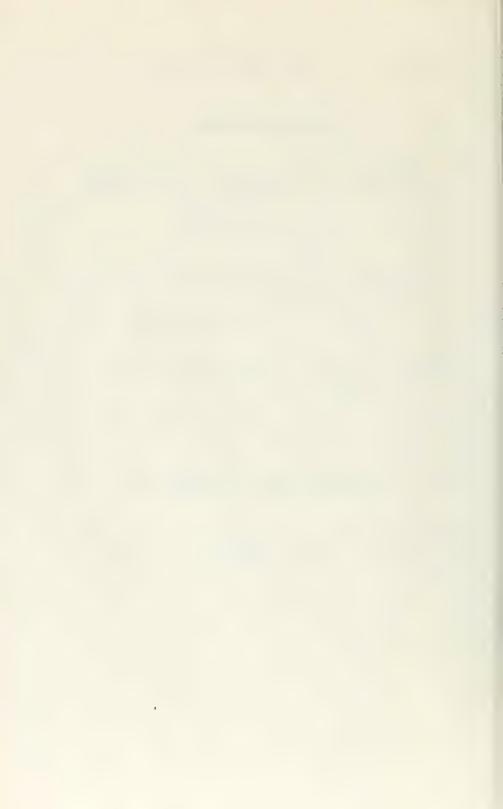
VS.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,

Defendant in Error.

## Transcript of Record.

Upon Writ of Error to the United States District Court of the District of Montana.



## INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	Page
Answer	17
Answer of Court to Writ of Error	29
Assignment of Errors	25
Attorneys, Names and Addresses of	1
Certificate of Clerk U.S. District Court to	
Transcript of Record	35
Citation on Writ of Error	29
Complaint	2
Demurrer	11
Judgment	22
Motion for Judgment on the Pleadings	19
Names and Addresses of Attorneys	1
Opinion	13
Opinion on Motion for Judgment on Pleadings	
Order Extending Time to and Including Janu-	
ary 25, 1918, to File Record and Docket	
Cause in Appellate Court	35
Order Extending Time to and Including Janu-	
ary 25, 1918, to File Record on Appeal	37
Order Overruling Demurrer to Complaint, etc	17
Petition for Writ of Error and Supersedeas	23
Praecipe for Transcript of Record	32
Stipulation Re Allowance of Writ of Error, etc.	31
Stipulation Re Submission of Motion of Plain-	
tiff for Judgment on Pleadings, etc	21
Writ of Error	27



## Names and Addresses of Attorneys.

- S. C. FORD, Attorney General, State of Montana, Helena Montana,
- FRANK WOODY, Asst. Attorney General, State of Montana, Helena, Montana,
- C. N. FOOT, Kalispell, Montana,
- T. H. MACDONALD, Kalispell, Montana, Attorneys for Plaintiff in Error.
- GUNN and RASCH, Helena, Montana, Attorneys for Defendant in Error.
- In the District Court of the United States, for the District of Montana, Helena Division.

No. 567.

NORTHERN PACIFIC RAILWAY COMPANY,
Plaintiff,

VS.

J. R. THOMPSON, as County Treasurer of Flathead County, Montana,

Defendant.

BE IT REMEMBERED, that on the 11th day of January, 1917, the Northern Pacific Railway Company filed its complaint herein, which said complaint is in words and figures following, to wit:

In the District Court of the United States, for the District of Montana, Helena Division.

# NORTHERN PACIFIC RAILWAY COMPANY, Plaintiff,

VS.

J. R. THOMPSON, as County Treasurer of Flathead County, Montana,

Defendant. [1\*]

### Complaint.

The plaintiff complains of defendant and for a first cause of action alleges:

I.

That the plaintiff is and has been for several years a corporation organized and existing under and by virtue of the laws of the State of Wisconsin.

#### TT.

That the defendant is the duly elected, qualified and acting treasurer of the county of Flathead, State of Montana, and a resident and citizen of said state.

#### Ш.

That this plaintiff is the owner of the following described lands situated in the county of Flathead, State of Montana, to wit: Southwest quarter of southwest quarter of section 1, township 21 north of range 15 west; all of section 3 and 5 of township 21 north of range 15 west; all of section 1, township 21 north of range 17 west, all of section 3,

<sup>\*</sup>Page-number appearing at foot of page of original certified Transcript of Record.

township 21 north of range 17 west and all of section 5, township 21 north of range 17 west.

#### IV.

That said lands are situated within forty miles of the railroad line adopted by the Northern Pacific Railroad Company along which line the said company constructed, operated and maintained a railroad from a point on Lake Superior to a point at or near Portland, in the State of Oregon; and said lands were granted to said company by the Act of Congress approved July 2, 1864, entitled "An Act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound on the Pacific Coast by the Northern Route."

### V.

That the said Northern Pacific Railroad Company was the predecessor of this plaintiff in the ownership of said lands. [2]

### VI.

That during the entire year 1914 said lands, and all thereof, were unsurveyed. In the year 1913 and during the months of September and October thereof surveys of said lands and other lands in said townships were made in the field by the United States and on December 14, 1914, the plats of said surveys were approved by the Surveyor-General of the United States for Montana, and on June 17, 1915, said plats were approved by the Commissioner of the General Land Office and on October 12, 1915, duplicates of the said plats so approved were filed in the land office at Kalispell, Montana,

for the district in which said lands are situated.

#### VII.

That notwithstanding said lands were unsurveyed as aforesaid, the assessor of Flathead County in the year 1916 assessed said lands as the property of this plaintiff for the year 1914 for the purpose of taxation and pursuant to and by virtue of said assessment taxes were levied and imposed against said lands for the said year 1914 to the amount of \$474.89.

#### VIII.

That this plaintiff made application to the County Board of Equalization of said county, while in session as such board during the year 1916, to cancel said assessment for the reason that said lands were unsurveyed in the year 1914 and not subject to taxation, which application was in writing and verified by oath of the duly authorized agent of this plaintiff. Said application was denied and refused by said board.

### IX.

That on the 28th day of November, 1916, this plaintiff paid said taxes to the county treasurer of said county, said payment having been made under protest in writing upon the ground that said lands were unsurveyed lands during the year 1914, and not subject to taxation.

# AND FOR A SECOND CAUSE OF ACTION PLAINTIFF ALLEGES: [3]

I.

That the plaintiff is and has been for several

years a corporation organized and existing under and by virtue of the laws of the State of Wisconsin.

#### TT.

That the defendant is the duly elected, qualified and acting treasurer of the county of Flathead, State of Montana, and a resident and citizen of said state.

#### III.

That this plaintiff is the owner of the following described lands situated in the county of Flathead, State of Montana, to wit: Southwest quarter of southwest quarter of section 1, township 21 north of range 15 west; all of sections 3 and 5, township 21 north of range 15 west; all of sections 1, 3 and 5, township 21 north of range 17 west; all of sections 1 and 3, township 21 north of range 18 west; all of sections 1, 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, 29, 31, 33, and 35, township 22 north of range 17 west; all of sections 1, 3, 5, 9, 11, 13, 15, and 17, township 22 north of range 18 west; east half of section 19, township 22 north of range 18 west; all of sections 21, 23, 25, 27, 29, 33 and 35, township 22 north of range 18 west.

#### TV.

That said lands are situated within forty miles of the railroad line adopted by the Northern Pacific Railroad Company along which line the said company constructed, operated and maintained a railroad from a point on Lake Superior to a point at or near Portland, in the State of Oregon; and said lands were granted to said company by the Act of Congress approved July 2, 1864, entitled "An Act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound on the Pacific Coast by the northern route."

#### V.

That the said Northern Pacific Railroad Company was the predecessor of this plaintiff in the ownership of said lands. [4]

#### VI.

That during the year 1915 said lands, and all thereof, were unsurveyed. In the years 1913 and 1914 surveys of said lands and other lands in said townships were made in the field by the United States and plats of said surveys were approved by the Surveyor-General of the United States for Montana, as follows: Township 21 north, of range 15 west and township 21 north of range 17 west, December 14, 1914; township 21 north of range 18 west, township 22 north of range 17 west and township 22 north of range 18 west, June 12, 1915; and said plats were approved by the Commissioner of the General Land Office as follows: Township 21 north of range 15 west, and township 21 north of range 17 west, June 7, 1915; township 21 north of range 18 west, township 22 north of range 17 west and township 22 north of range 18 west, December 17, 1915; and duplicates of said plats so approved were filed in the land office at Kalispell, Montana, for the district in which said lands are situated, as follows: Township 21 north of range 15 west and township 21 north of range 17 west, October 12, 1915; township 21 north of range

18 west, March 8, 1916, and township 22 north of range 17 west, and township 22 north of range 18 west, March 15, 1916.

#### VII.

That notwithstanding said lands were unsurveyed as aforesaid, the assessor of Flathead County in the year 1916 assessed said lands as the property of this plaintiff for the year 1915 for the purpose of taxation and pursuant to and by virtue of said assessment taxes were levied and imposed against said lands for the said year 1915 to the amount of \$3,983.85.

#### VIII.

That this plaintiff made application to the County Board of Equalization of said county, while in session as such board during the year 1916, to cancel said assessment for the reason that said [5] lands were unsurveyed in the year 1915 and not subject to taxation, which application was in writing and verified by oath of the duly authorized agent of this plaintiff. Said application was denied and refused by said board.

#### IX.

That on the 28th day of November, 1916, this plaintiff paid said taxes to the county treasurer of said county, said payment having been made under protest in writing upon the ground that said lands were unsurveyed lands during the year 1915 and not subject to taxation.

AND FOR A THIRD CAUSE OF ACTION PLAINTIFF ALLEGES:

#### I.

That the plaintiff is and has been for several years a corporation organized and existing under and by virtue of the laws of the State of Wisconsin.

#### II.

That the defendant is the duly elected, qualified and acting treasurer of the county of Flathead, State of Montana, and a resident and citizen of said State.

### III.

That this plaintiff is the owner of the following described lands situated in the county of Flathead, State of Montana, to wit: All of sections 1, 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, 29, 31, 33, and 35, township 22 north of range 17 west; all of sections 1 and 3, township 21 north of range 18 west; all of sections 1, 3, 5, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, 29, 33 and 35, township 22 north of range 18 west.

#### IV.

That said lands are situated within forty miles of the railroad line adopted by the Northern Pacific Railroad Company along which line the said company constructed, operated and maintained a railroad from a point on Lake Superior to a point at or near Portland, in the State of Oregon; and said lands were granted to said [6] company by the Act of Congress approved July 2, 1864, entitled "An Act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior

to Puget Sound on the Pacific Coast by the northern route."

#### V.

That the said Northern Pacific Railroad Company was the predecessor of this plaintiff in the ownership of said lands.

#### VI.

That on the first Monday of March, 1916, said lands, and all thereof, were unsurveyed. In the years 1913 and 1914 surveys of said lands and other lands in said townships were made in the field by the United States and plats of said surveys were approved by the Surveyor-General of the United States for Montana, on June 12, 1915, and the same were approved by the Commissioner of the General Land Office on December 17, 1915, and duplicates of said plats so approved were filed in the land office at Kalispell, Montana, for the district in which said lands are situated, as follows: Township 21 north of range 18 west, March 8, 1916; township 22 North of range 17 west and township 22 north of range 18 west, March 15, 1916.

## VII.

That notwithstanding said lands were unsurveyed as aforesaid, the assessor of Flathead County in the year 1916 assessed said lands as the property of this plaintiff for the year 1916 for the purpose of taxation and pursuant to and by virtue of said assessment taxes were levied and imposed against said lands for the said year 1916 to the amount of \$3,951.37.

#### VIII.

That this plaintiff made application to the County Board of Equalization of said county, while in session as such board during the year 1916, to cancel said assessment for the reason that said lands were unsurveyed on the first Monday in March, 1916, and not [7] subject to taxation, which application was in writing and verified by oath of the duly authorized agent of this plaintiff. Said application was denied and refused by said board.

#### IX.

That on the 28th day of November, 1916, this plaintiff paid said taxes to the county treasurer of said county, said payment having been made under protest in writing upon the ground that said lands were unsurveyed lands during the year 1916 and not subject to taxation.

WHEREFORE, plaintiff demands judgment against said defendant for the sum of \$8,410.11, with interest from the 28th day of November, 1916, and costs of this action.

GUNN & RASCH, Attorneys for Plaintiff.

State of Montana,

County of Lewis and Clark,—ss.

M. S. Gunn, being duly sworn, deposes and says: That he is an officer of the above-named plaintiff, to wit, one of its division counsel for the State of Montana; that he has read the foregoing complaint and knows the contents thereof and that the same is true to the best of his knowledge, information and belief.

M. S. GUNN.

Subscribed and sworn to before me this 10th day of January, 1917.

[N. S.] W. W. PATTERSON,

Notary Public for the State of Montana, Residing at Helena, Montana.

My commission expires May 6, 1917.

[Endorsed]: Title of Court and Cause. Complaint. Filed January 11th, 1917. Geo. W. Sproule, Clerk. By C. R. Garlow, Deputy. [8]

And thereafter, to wit, on the 31st day of January, 1917, a demurrer was duly served and filed herein, which is entered of record as follows, to wit:

In the District Court of the United States, for the District of Montana, Helena Division.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,

Plaintiff,

VS.

J. R. THOMPSON, as County Treasurer of Flathead County, Montana,

Defendant.

#### Demurrer.

I.

Comes now the defendant and demurs to the first cause of action set forth and alleged in the complaint herein on the ground that the same does not state facts sufficient to constitute a cause of action.

#### II.

Defendant further demurs to the second cause of action set forth and alleged in the complaint on the ground that the same does not state facts sufficient to constitute a cause of action.

#### III.

Defendant further demurs to the third cause of action set forth and alleged in the complaint on the ground that the same does not state facts sufficient to constitute a cause of action.

#### IV.

Defendant demurs to the complaint herein and the whole thereof, on the ground that the same does not state facts sufficient to constitute a cause of action.

> C. H. FOOT and T. H. MacDONALD. [9]

County Attorney for Flathead County, and

C. H. FOOT,

Attorneys for the Defendant.

[Endorsed]: Title of Court and Cause. Demurrer. Filed January 31st, 1917. Geo. W. Sproule, Clerk. By C. R. Garlow, Deputy.

That thereafter said demurrer came on regularly for hearing, and oral argument was made and briefs filed on behalf of the plaintiff and defendant herein, and said demurrer was by the Court taken under advisement, and that thereafter, to wit, on the 27th day of June, 1917, the Court filed herein its opinion in writing, which is in words and figures following, to wit:

United States District Court, Montana.

NORTHERN PACIFIC RAILWAY COMPANY,
vs.

THOMPSON, County Treasurer.

## Opinion.

Plaintiff sues to recover taxes paid under protest, alleging the lands taxed are of its land grant, and were unsurveyed at and for the times for which the taxes were laid. Defendant demurs.

It appears that for all the lands the field work for survey was done prior to the annual dates fixing liability in general for taxes for the periods these taxes were levied. In some thereof the Commissioner of the General Land Office had approved the surveys and plats prior to said dates, and in some he had not; but in none were the plats filed in the local land office until after said dates.

It is conceded the lands are taxable when surveyed and not before. Plaintiff contends lands are not surveyed until the survey plats approved by

the Commissioner are filed in the local land office, citing: [10]

U. S. v. Curtner, 38 Fed. 1;

Lumber Co. v. Shoshone Co., 155 Fed. 613;

Sawyer v. Gray, 205 Fed. 160;

U. S. v. Morrison, 240 U. S. 192.

Defendant contends that lands are surveyed so far as taxation is concerned, when the field work is done, citing Wells County v. McHenry et al. (N. Dak.), 74 N. W. 241.

The Court decides that lands are surveyed when the Commissioner approves the survey and plats.

Both parties cite act July 10, 1886 (24 Stat. L. 143), which provides that grant lands shall not be exempt from taxation "on account of the lien of the United States" thereon for costs of survey, "but this provision shall not apply to lands unsurveyed."

It seems the only effect of this statute is to open to taxation surveyed grant lands though subject to said lien. The words withholding application of the statute to unsurveyed lands are unnecessary, superfluous and excessive legislative caution, in that unsurveyed lands are not exempt from taxation because of said lien, but because not carved out of lands of the United States, because they are not defined, made certain, and identified, because as they are indistinguishable from lands of the United States, taxes ostensibly upon them might actually be upon lands of the United States, always untaxable, and cause embarrassment to the possession and title of the United States and to its disposition

of its lands, which no State administration has power to do. The reasons why unsurveyed grant lands are untaxable are the same now as before the statute and depend not at all upon the statute.

The law requires the commissioner to survey the public lands. He supervises all surveys and none are complete until he approves. Though the field work be done and plats made, all are but intermediate steps by his instruments, going for nothing [11] unless he approves.

There is no survey until officially approved by him, and when he approves, the survey thereby is made and officially complete. His approval is judicial and a public record in the General Land Office. Thereafter, filing the plats in the local land office is ministerial, no part of the survey, and but to make the plats locally accessible for record of rights to and entries of the lands. True, until plats are so filed, the Commissioner can revoke his approval. But so can he after the plats are filed; and this latent power no more detracts from the effect of his approval accomplishing an officially completed survey, than does the power of a Court over its decrees during term, from their finality.

When he approves the survey and plats and not before, the lands lose the status of unsurveyed, are survey, carved out, identified, and capable of reduction to the grantee's use, and doubtless the grantee then could first pay off the lien and secure patents.

There are expressions in cases cited by plaintiff, and in others, tending to support its contention. But they are unnecessary to the decisions or are in relation to priority of rights that can be initiated or asserted only after plats are filed. U. S. v. Morrison, supra, contains much recognizing surveys officially complete when approved by the Commissioner. It is believed that the doctrine of relation relied on in Wells County v. McHenry et al., supra, has no application. It is the law of taxation that to be taxable, lands must be of taxable status at and for the time taxes are laid. A change in status from untaxable to taxable, occurring subsequent to said time, will not relate back so as to subject them to taxation at and for the said earlier time, but only opens the lands to taxes thereafter accruing.

Demurrer overruled as to counts one and two, and sustained as to count three. [12]

BOURQUIN, J.

[Endorsed]: Memo. On Demurrer. Filed June 27, 1917. Geo. W. Sproule, Clerk. By C. R. Garlow, Deputy.

Thereafter, on June 28, 1917, order on Demurrer was made as follows:

In the District Court of the United States, for the District of Montana (Helena Division).

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,

Plaintiff,

VS.

J. R. THOMPSON, as County Treasurer of Flathead County, Montana,

Defendant.

### Order Overruling Demurrer to Complaint, etc.

Herein, Court this day ordered that the demurrer to the complaint be overruled as to counts one and two and sustained as to count three, in accordance with memoranda decision filed.

Entered in open court June 28, 1917.

GEO. W. SPROULE, Clerk.

And thereafter, to wit, on July 17, 1917, said defendant duly served and filed herein its answer to said complaint, which answer is in words and figures following, to wit:

In the District Court of the United States, for the District of Montana, Helena Division.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,

Plaintiff,

VS.

J. R. THOMPSON, as County Treasurer of Flathead County, Montana,

Defendant.

### Answer.

Comes now the defendant and for answer to the complaint herein, admits as follows, to wit:

FIRST. Admits each and every allegation, matter and thing in plaintiff's first cause of action alleged.

SECOND. Admits each and every allegation,

matter and thing [13] in plaintiff's second cause of action alleged.

THIRD. Admits each and every allegation, matter and thing in plaintiff's third cause of action alleged.

WHEREFORE, defendant having fully answered, prays judgment against the plaintiff that he go hence with his costs and that plaintiff take nothing by this action.

### T. H. MacDONALD

County Attorney for Flathead County,
Attorney for Defendant.

State of Montana, County of Flathead,—ss.

T. H. MacDonald, being first duly sworn, deposes and says: That he is the duly and regularly elected, qualified and acting County Attorney of Flathead County, State of Montana; that he makes this verification as such county attorney; that he has read the foregoing Answer and knows the contents thereof and that the same is true according to his best knowledge, information and belief.

### T. H. MacDONALD.

Subscribed and sworn to before me this sixteenth day of July, in the year one thousand nine hundred and seventeen.

[N. S.] C. H. FOOT,

Notary Public for the State of Montana, Residing at Kalispell, Montana.

My commission expires Aug. 21st, 1918.

[Endorsed]: Title of Court and Cause. Answer. Filed July 17, 1917. Geo. W. Sproule, Clerk.

And thereafter, to wit, on October 5, 1917, the plaintiff served and filed herein its motion for judgment on the pleadings, which said motion is in words and figures following, to wit:

In the District Court of the United States, for the District of Montana, Helena Division.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,

Plaintiff, [14]

VS.

J. R. THOMPSON, as County Treasurer of Flathead County, Montana,

Defendant.

Motion for Judgment on the Pleadings.

I.

Now comes the plaintiff above named and moves the Court for judgment on the pleadings as to the first cause of action contained in plaintiff's complaint on file herein upon the ground that all the allegations in said cause of action are admitted in the answer on file herein.

### II.

Moves the Court for judgment on the pleadings as to the second cause of action contained in plaintiff's complaint on file herein upon the ground that all the allegations in said cause of action are admitted in the answer on file herein.

### III.

Moves the Court for judgment on the pleadings as to the third cause of action contained in plaintiff's complaint on file herein upon the ground that all the allegations in said cause of action are admitted in the answer on file herein.

This motion will be based upon the complaint and answer on file herein.

GUNN, RASCH & HALL, Attorneys for Plaintiff.

[Endorsed]: Motion. Filed Oct. 5th, 1917. Geo. W. Sproule, Clerk.

And thereafter, to wit, on the 5th day of October, 1917, there was filed herein a stipulation for the submission of said motion to the Court for decision, which said stipulation is in words and figures as follows:

In the District Court of the United States, for the District of Montana, Helena Division. [15]

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,

Plaintiff,

VS.

J. R. THOMPSON, as County Treasurer of Flathead County, Montana,

Defendant.

# Stipulation Re Submission of Motion of Plaintiff for Judgment on Pleadings, etc.

It is hereby stipulated and agreed that the motion of the plaintiff on file herein for judgment on the pleadings may be submitted on the arguments made and briefs submitted by the parties hereto at the hearing of the demurrer to plaintiff's complaint.

Dated this 29th day of September, 1917.

GUNN, RASCH & HALL,
Attorneys for Plaintiff.
T. H. MacDONALD,
Attorney for Defendant.

[Endorsed]: Stipulation. Filed Oct. 5th, 1917. Geo. W. Sproule, Clerk.

That thereafter, pursuant to said stipulation, said motion was submitted to the Court and thereafter, to wit, on the 5th day of October, 1917, the Court wrote its opinion on the bottom of said motion, which opinion is in words and figures following, to wit:

### Opinion on Motion for Judgment on Pleadings.

For reasons, decision of June 27, 1917, motion granted in respect to counts one and two, and denied count three.

October 5, 1917.

BOURQUIN, J.

And thereafter, to wit, on October 9, 1917, judgment was duly rendered and entered herein in words and figures following, to wit: [16]

In the District Court of the United States, for the District of Montana (Helena Division).

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,

Plaintiff,

VS.

J. R. THOMPSON, as County Treasurer of Flathead County, Montana,

Defendant.

### Judgment.

The above-entitled cause having come on regularly for hearing on the motion of plaintiff for judgment on the pleadings as to each cause of action stated in the complaint, and said cause having been submitted for final decision and judgment on said motion and the Court having on the 5th day of October, 1917, rendered its judgment granting said motion as to the first and second causes of action and denying said motion as to the third cause of action, it is now ORDERED, ADJUDGED AND DECREED that the plaintiff have and recover of and from the defendant on the first and second causes of action set out in said complaint, the sum of \$4,767.83, with interest thereon at the rate of eight per cent per annum from the date hereof until paid, together with plaintiff's costs and disbursements incurred in this action taxed in the sum of \$28.60, and it is further ORDERED, ADJUDGED AND DECREED that the said complaint be and the same is hereby dismissed as to the third cause of action.

Entered October 9th, 1917.

GEO. W. SPROULE, Clerk.

[Endorsed]: Judgment. Filed Oct. 9th, 1917. Geo. W. Sproule, Clerk. [17]

And thereafter, on December 17th, 1917, a petition for writ of error was duly filed herein, which is in the words and figures following, to wit:

In the District Court of the United States for the District of Montana.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,

Plaintiff,

VS.

J. R. THOMPSON, as County Treasurer of Flathead County, Montana,

Defendant.

### Petition for Writ of Error and Supersedeas.

J. R. Thompson, as county treasurer of Flathead County, Montana, the defendant in the above-named cause, feeling himself aggrieved by the judgment entered herein on the 9th day of October, 1917, in favor of said plaintiff and against said defendant, for the sum of \$4,767.83 on the first and second causes of action in the complaint on file herein, and

for interest from the date thereof at 8% per annum, and for the sum of \$28.60 as plaintiff's costs and disbursements.

Comes now C. H. Foot, T. H. MacDonald, and S. C. Ford, Attorney General, and Frank Woody, Assistant Attorney General of the State of Montana, his attorneys, and petitions the above-entitled court for an order allowing said defendant to prosecute a writ or error to the Honorable United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided, and also that an order be made that all further proceedings in this court be suspended and stayed until the determination of said writ of error by the United States Circuit Court of Appeals for the Ninth Circuit.

C. H. FOOT, T. H. MacDONALD, [18] S. C. FORD,

Attorney General of the State of Montana. FRANK WOODY,

Assistant Attorney General of the State of Montana.

Allowed this 17th day of December, 1917.

BOURQUIN,

Judge.

[Endorsed]: Petition for Writ of Error and Supersedeas. Filed December 17th, 1917. C. R. Garlow, Clerk. And thereafter, on December 17th, 1917, defendant filed his assignment of errors herein which is in the words and figures following, to wit:

In the District Court of the United States for the District of Montana.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,

Plaintiff,

VS.

J. R. THOMPSON, as County Treasurer of Flathead County, Montana,

Defendant.

### Assignment of Errors.

Comes *not* the defendant, J. R. Thompson, as county treasurer of Flathead County, Montana, plaintiff in error, and files the following assignment of errors upon which he will rely upon his prosecution of the writ of error in the above-entitled cause:

I.

That the United States District Court for the District of Montana, Ninth Circuit, erred in over-ruling the demurrer of the defendant to the first cause of action stated in the complaint of the plaintiff and defendant in error herein for the reason that said cause of action does not state facts sufficient to constitute a cause of action. [19]

II.

That the said Court erred in overruling the de-

murrer of the defendant to the second cause of action stated in the complaint of the plaintiff and defendant in error herein for the reason that said cause of action does not state facts sufficient to constitute a cause of action.

#### III.

That the said Court erred in sustaining the motion of the plaintiff and defendant in error herein for judgment on the pleadings as to the first cause of action stated in the complaint on file herein for the reason that said cause of action does not state facts sufficient to constitute a cause of action.

#### IV.

That the said Court erred in sustaining the motion of the plaintiff and defendant in error herein for judgment on the pleadings as to the second cause of action stated in the complaint on file herein for the reason that the said cause of action does not state facts sufficient to constitute a cause of action.

WHEREFORE, the said J. R. Thompson, as treasurer of Flathead County, Montana, defendant and plaintiff in error, prays that the judgment of the District Court of the United States for the District of Montana, entered herein on the 9th day of October, 1917, in favor of said plaintiff and against said defendant, for the sum of \$4,767.83, on the first and second causes of action in the complaint herein, and for interest from the date thereof at 8% per annum, and for the sum of \$28.60 as plaintiff's costs and disbursements, be reversed and that the said District Court be directed to deny said motion of the plaintiff and defendant in error herein, for

judgment on the pleadings as to said first and second [20] causes of action.

C. H. FOOT,
T. H. MacDONALD,
S. C. FORD,

Attorney General of the State of Montana, FRANK WOODY,

Assistant Attorney General of the State of Montana. Attorneys for Defendant and Plaintiff in Error.

[Endorsed]: Assignment of Errors. Filed December 17th, 1917. C. R. Garlow, Clerk.

And thereafter, on December 17th, 1917, a writ of error was duly issued herein, which is hereto annexed and is in the words and figures following, to wit: [21]

### Writ of Error.

UNITED STATES OF AMERICA,—ss.

THE PRESIDENT OF THE UNITED STATES, to the Honorable, the Judge of the District Court of the United States for the District of Montana, GREETING:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in said District Court, before you, between Northern Pacific Railway Company, plaintiff and R. J. Thompson, as county treasurer of Flathead County, Montana, defendant, a manifest error hath happened, to the great damage of the said J. R. Thompson, as county treasurer of Flathead County, Monson, as county treasurer of Flathead County, Monson,

tana, plaintiff in error, as is said and appears by the petition herein;

We, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if the judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco, in the State of California, on the 10th day of January next, in the said Circuit Court of Appeals, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct these errors what of right and according to the laws and customs of the United States should be done.

WITNESS the Honorable EDWARD DOUG-LASS WHITE, Chief Justice of the Supreme Court of the United States, the 17 day of December, 1917, the one hundred and forty-second year of the Independence of the United States of America.

[Seal] C. R. GARLOW,

Clerk of the United States District Court for the District of Montana, Ninth Circuit. [22]

Service of the within and foregoing Writ of Error and receipt of a copy thereof is hereby admitted this 21st day of December, 1917.

GUNN & RASCH, Attorneys for Defendant in Error.

### Answer of Court to Writ of Error.

The Answer of the Honorable, the Judge of the District Court of the United States for the District of Montana, to the foregoing writ:

The record and proceedings whereof mention is made, with all things touching the same, I certify under the seal of the said District Court, to the Honorable Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within contained, in a certain schedule to this writ annexed, as within I am commanded.

By the Court.

[Seal]

C. R. GARLOW.

Clerk of the District Court of the United States, District of Montana. [23]

[Endorsed]: #567. Northern Pacific Railway Company, a Corporation, Plaintiff and Defendant in Error, vs. J. R. Thompson, as County Treasurer of Flathead County, Montana, Defendant and Plaintiff in Error. Writ of Error. Filed Jan. 4, 1918. C. R. Garlow, Clerk. [24]

That, on December 17th, 1917, a citation was duly issued herein, which is hereto attached and is in the words and figures following, to wit: [25]

### Citation on Writ of Error.

UNITED STATES OF AMERICA,—ss.

To Northern Pacific Railway Company and to Gunn, Rasch & Hall, Its Attorneys:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Ap-

peals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, on the 10th day of January, 1918, pursuant to a writ of error on file in the clerk's office of the District Court of the United States, of the Ninth Judicial Circuit, in and for the District of Montana, in that certain action No. 567, wherein J. R. Thompson, as county treasurer of Flathead County, Montana, is plaintiff in error, and the Northern Pacific Railway Company, a corporation, is defendant in error, to show cause, if any there be, why the judgment given, made and rendered against the said J. R. Thompson, as county treasurer of Flathead County, Montana, in the said writ of error mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States of America, this 17 day of December, 1917, and of the Independence of the United States the one hundred and forty-second.

BOURQUIN,

United States District Judge, District of Montana.

Service of the within and foregoing citation is hereby acknowledged this 21st day of December, 1917.

### GUNN & RASCH,

Attorneys for Defendant in Error. [26]

[Endorsed]: #567. Northern Pacific Railway Company, a Corporation, Plaintiff and Defendant in Error, vs. J. R. Thompson as County Treasurer of Flathead County, Montana, Defendant and Plaintiff in Error. Citation. Filed Jan. 4, 1918. C. R. Garlow, Clerk. [27]

And thereafter on December 17th, 1917, a stipulation waiving supersedeas and cost bond was filed herein, which is in the words and figures following, to wit:

In the District Court of the United States for the District of Montana.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,

Plaintiff,

VS.

J. R. THOMPSON, as County Treasurer of Flathead County, Montana,

Defendant.

### Stipulation Re Allowance of Writ of Error, etc.

It is hereby stipulated and agreed by and between the above-named parties, plaintiff and defendant, that the petition of the above-named defendant for a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit may be allowed and that all further proceedings in the above-entitled court may be suspended and stayed until the determination of said writ of error by said United States Circuit Court of Appeals without said defendant being ordered or required to file a supersedeas bond.

And it is further stipulated and agreed by and

between said parties, plaintiff and defendant, that the said defendant shall not be required to file a cost bond, but that the filing of such cost bond is expressly waived.

S. C. FORD,

Attorney General of the State of Montana, Attorney for Defendant.

GUNN & RASCH, Attorneys for Plaintiff.

[Endorsed]: Stipulation. Filed December 17th, 1917. C. R. Garlow, Clerk.

Thereafter, on Jan. 4, 1918, praecipe for transcript was filed herein, as follows:

In the District Court of the United States for the District of Montana.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,

Plaintiff and Defendant in Error, vs. [28]

J. R. THOMPSON, as County Treasurer of Flathead County, Montana,

Defendant and Plaintiff in Error.

### Praecipe for Transcript of Record.

To Gunn and Rasch, Attorneys for the Above-named Plaintiff and Defendant in Error, and C. R. Garlow, Clerk of Said Court:

You, and each of you, will please take notice that the undersigned, the attorneys for the defendant and plaintiff in error above named, hereby serve upon you, and each of you, this praecipe in conformity with the rules of court, to indicate to you the portions of the records and files in the above-entitled cause which said defendant and plaintiff in error desires to and will incorporate in its transcript of record on writ of error herein, to wit, the writ of error issued herein on the 17th day of December, 1917, to have the judgment before rendered and entered herein reviewed by the United States Circuit Court of Appeals for the Ninth Circuit, and the clerk of said District Court will incorporate and include in said transcript the following:

- 1. Complaint, demurrer thereto, decision of Court on said demurrer, order overruling demurrer as to first two causes of action and sustaining it as to third cause of action, answer, motion for judgment on pleadings, stipulation that said motion may be submitted on the arguments made and briefs filed at the time of the argument of the demurrer to complaint, decision of court on said motion, and judgment.
- 2. Petition for writ of error and order allowing same.
- 3. Assignment of errors filed with petition for writ of error.
- 4. Writ of error and acknowledgment of service by plaintiff.
- 5. Citation on writ of error and acknowledgment of service by defendant. [29]
  - 6. Stipulation waiving bonds.

7. Copy of this praecipe.

S. C. FORD,

Attorney General of the State of Montana.

FRANK WOODY,

Assistant Attorney General of the State of Montana.

C. H. FOOT,

T. H. MacDONALD,

Attorneys for Defendant and Plaintiff in Error.

Service of the within and foregoing praccipe and receipt of copy thereof admitted and acknowledged this 22d day of December, 1917.

GUNN & RASCH,

Attorneys for Plaintiff and Defendant in Error.

[Endorsed]: Praecipe for Transcript of Record. Filed Jan. 4, 1918. C. R. Garlow, Clerk. [30]

Thereafter, on Jan. 4, 1918, Order extending time for filing record on appeal herein was duly made, as follows:

In the District Court of the United States for the District of Montana.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,

Plaintiff,

VS.

J. R. THOMPSON, as Treasurer of Flathead County, Montana,

Defendant.

# Order Extending Time to and Including January 25, 1918, to File Record and Docket Cause in Appellate Court.

For good cause appearing, it is ordered that the time within which the record on appeal herein is to be filed in the United States Circuit Court of Appeals for the Ninth Circuit be, and the same is hereby extended to and including the 25th day of January, 1918.

Dated Jan. 4th, 1918.

GEO. M. BOURQUIN, Judge. [31]

# Certificate of Clerk U.S. District Court to Transcript of Record.

United States of America, District of Montana,—ss.

I, C. R. Garlow, clerk of the United States District Court of the District of Montana, do hereby certify and return to the Honorable the United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing consisting of 31 pages, numbered consecutively from 1 to 31, both numbers inclusive, is a true and correct transcript of all pleadings, decisions, judgment, and of all proceedings in said cause required to be incorporated in the record on writ of error by the praecipe of the defendant and plaintiff in error for said record, and consists of full, true, correct and complete copies of the complaint, demurrer to complaint, decision on said demurrer, answer, motion for judgment on the pleadings, stipula-

tion for submission of said motion on the arguments made and briefs submitted [32] on the hearing of said demurrer, decision on said motion, judgment, petition for writ of error and order allowing same, assignment of errors, stipulation waiving supersedeas and cost bonds, praecipe for record, order extending time to file record, and of the whole thereof, as the same appears from the original records and files of said court in my possession as such clerk; and I do further certify and return that I have annexed to said transcript and included within the paging thereof, the original writ of error and citation issued in said cause.

I further certify that the costs of the transcript of record amount to the sum of fifteen and 45/100 (\$15.45) dollars, and have been made a charge against defendant and plaintiff in error.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said court at Helena, Montana, this 11th day of January, 1918.

[Seal]

C. R. GARLOW,

Clerk. [33]

[Endorsed]: No. 3085. United States Circuit Court of Appeals for the Ninth Circuit. J. R. Thompson, as County Treasurer of Flathead County, Montana, Plaintiff in Error, vs. Northern Pacific Railway Company, a Corporation, Defendant in Error. Transcript of Record. Upon Writ of Error

to the United States District Court of the District of Montana

Filed January, 14, 1918.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien, Deputy Clerk.

In the District Court of the United States for the District of Montana.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,

Plaintiff,

VS.

J. R. THOMPSON, as Treasurer of Flathead County, Montana,

Defendant.

Order Extending Time to and Including January 25, 1918, to File Record on Appeal.

For good cause appearing, it is ordered that the time within which the record on appeal herein is to be filed in the United States Circuit Court of Appeals for the Ninth Circuit be, and the same is hereby extended to and including the 25th day of January, 1918.

Dated Jan. 4th, 1918.

BOURQUIN, Judge. [Endorsed]: No. 3085. United States Circuit Court of Appeals for the Ninth Circuit. J. R. Thompson, Treasurer, Plaintiff in Error, vs. Northern Pacific Ry. Co., Defendant in Error. Order Extending Time to File Record to January 25, 1918. Filed Jan. 8, 1918. F. D. Monckton, Clerk. Re-filed Jan. 14, 1918. F. D. Monckton, Clerk.

### United States

### Circuit Court of Appeals

for the Rinth Circuit

NORTHERN PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

VS.

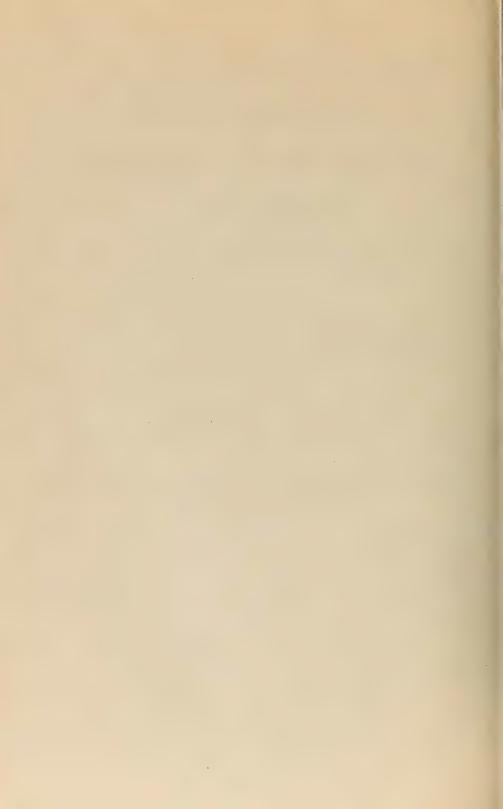
J. R. THOMPSON, as County Treasurer of Flathead County, Montana,

Defendant in Error.

### Transcript of Record.

Upon Writ of Error to the United States District Court for the District of Montana.

> FILED HE 4 1917 F. D. MONCKTON,



# United States Circuit Court of Appeals

for the Binth Circuit

NORTHERN PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

VS.

J. R. THOMPSON, as County Treasurer of Flathead County, Montana,

Defendant in Error.

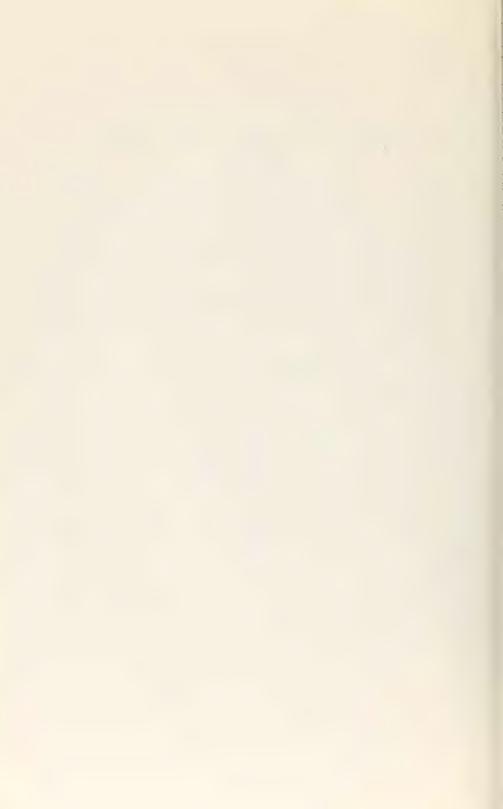
# Transcript of Record.

Upon Writ of Error to the United States District Court for the District of Montana



# INDEX OF PRINTED TRANSCRIPT OF RECORD.

P	age.
Names and Addresses of Attorneys	. 1
Answer	. 17
Answer of Court to Writ of Error	. 27
Assignment of Errors	. 24
Bond	. 31
Clerk's Certificate to Transcript of Record	. 35
Citation on Writ of Error	27
Complaint	. 1
Demurrer to Complaint	. 11
Judgment	. 21
Motion for Judgment on Pleadings	. 19
Opinion of Court	. 13
Order Overruling in Part and Sustaining in	1
Part Demurrer to Complaint	. 16
Order Overruling in Part and Sustaining in	)
Part Motion for Judgment on Pleadings	. 20
Order Fixing Amount of Bond	. 29
Petition for Writ of Error	. 23
Praecipe for Record	. 33
Stipulation	. 20
Writ of Error	95



NAMES AND ADDRESSES OF ATTORNEYS: GUNN AND RASCH, Helena, Montana. Attorneys for Plaintiff.

C. H. FOOT AND T. H. McDONALD, Kalispell, Montana.

Attorneys for Defendant.

In the District Court of the United States, for the District of Montana, Helena Division.

NORTHERN PACIFIC RAILWAY COMPANY, Plaintiff,

VS.

J. R. THOMPSON, as County Treasurer of Flathead County, Montana,

Defendant.

No. 567.

BE IT REMEMBERED, that on the 11th day of January, 1917, the Northern Pacific Railway Company filed its complaint herein, which said complaint is in words and figures following, towit:

In the District Court of the United States, for the District of Montana, Helena Division.

NORTHERN PACIFIC RAILWAY COMPANY,
Plaintiff,

VS.

J. R. THOMPSON, as County Treasurer of Flathead County, Montana,

Defendant.

### COMPLAINT.

The plaintiff complains of defendant and for a first cause of action alleges:

I.

That the plaintiff is and has been for several years a corporation organized and existing under and by virtue of the laws of the State of Wisconsin.

### II.

That the defendant is the duly elected, qualified and acting treasurer of the County of Flathead, State of Montana, and a resident and citizen of said state.

### III.

That this plaintiff is the owner of the following described lands situated in the County of Flathead, State of Montana, to-wit: Southwest quarter of southwest quarter of section 1, township 21 north of range 15 west; all of section 3 and 5 of township 21 north of range 15 west; all of section 1, township 21 north of range 17 west, all of section 3, township 21 north of range 17 west and all of section 5, township 21 north of range 17 west.

### IV.

That said lands are situated within forty miles of the railroad line adopted by the Northern Pacific Railroad Company along which line the said company constructed, operated and maintained a railroad from a point on Lake Superior to a point at or near Portland, in the State of Oregon;

and said lands were granted to said company by the Act of Congress approved July 2, 1864, entitled "An Act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound on the Pacific Coast by the Northern Route."

### V.

That the said Northern Pacific Railroad Company was the predecessor of this plaintiff in the ownership of said lands.

#### VI.

That during the entire year 1914 said lands, and all thereof, were unsurveyed. In the year 1913 and during the months of September and October thereof surveys of said lands and other lands in said townships were made in the field by the United States and on December 14, 1914, the plats of said surveys were approved by the Surveyor General of the United States for Montana, and on June 17, 1915, said plats were approved by the Commissioner of the General Land Office and on October 12, 1915, duplicates of the said plats so approved were filed in the land office at Kalispell, Montana, for the district in which said lands are situated.

### VII.

That notwithstanding said lands were unsurveyed as aforesaid, the assessor of Flathead County in the year 1916 assessed said lands as the property of this plaintiff for the year 1914 for the purpose of taxation and pursuant to and by vir-

### Northern Pacific Railway Company

4

tue of said assessment taxes were levied and imposed against said lands for the said year 1914 to the amount of \$474.89.

### VIII.

That this plaintiff made application to the County Board of Equalization of said county, while in session as such board during the year 1916, to cancel said assessment for the reason that said lands were unsurveyed in the year 1914 and not subject to taxation, which application was in writing and verified by oath of the duly authorized agent of this plaintiff. Said application was denied and refused by said board.

### IX.

That on the 28th day of November, 1916, this plaintiff paid said taxes to the county treasurer of said county, said payment having been made under protest in writing upon the ground that said lands were unsurveyed lands during the year 1914 and not subject to taxation.

AND FOR A SECOND CAUSE OF ACTION PLAINTIFF ALLEGES:

### I.

That the plaintiff is and has been for several years a corporation organized and existing under and by virtue of the laws of the State of Wisconsin.

### II.

That the defendant is the duly elected, qualified and acting treasurer of the County of Flat-

head, State of Montana, and a resident and citizen of said state.

### III.

That this plaintiff is the owner of the following described lands situated in the County of Flathead, State of Montana, to-wit: Southwest quarter of southwest quarter of section 1, township 21 north of range 15 west; all of sections 3 and 5, township 21 north of range 15 west; all of sections 1, 3 and 5, township 21 north of range 17 west; all of sections 1 and 3, township 21 north of range 18 west; all of sections 1, 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, 29, 31, 33 and 35, township 22 north of range 17 west; all of sections 1, 3, 5, 9, 11, 13, 15 and 17, township 22 north of range 18 west; east half of section 19, township 22 north of range 18 west; all of sections 21, 23, 25, 27, 29, 33 and 35, township 22 north of range 18 west.

### IV.

That said lands are situated within forty miles of the railroad line adopted by the Northern Pacific Railroad Company along which line the said company constructed, operated and maintained a railroad from a point on Lake Superior to a point at or near Portland, in the State of Oregon; and said lands were granted to said company by the Act of Congress approved July 2, 1864, entitled "An Act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound on the Pacific

Coast by the northern route."

V.

That the said Northern Pacific Railroad Company was the predecessor of this plaintiff in the ownership of said lands.

### VI.

That during the year 1915 said lands, and all thereof, were unsurveyed. In the years 1913 and 1914 surveys of said lands and other lands in said townships were made in the field by the United States and plats of said surveys were approved by the Surveyor General of the United States for Montana, as follows: Township 21 north of range 15 west and township 21 north of range 17 west, December 14, 1914; township 21 north of range 18 west, township 22 north of range 17 west and township 22 north of range 18 west. June 12, 1915; and said plats were approved by the Commissioner of the General Land Office as follows: Township 21 north of range 15 west, and township 21 north of range 17 west, June 7, 1915; township 21 north of range 18 west, township 22 north of range 17 west and township 22 north of range 18 west, December 17, 1915; and duplicates of said plats so approved were filed in the land office at Kalispell, Montana, for the district in which said lands are situated, as follows: Township 21 north of range 15 west and township 21 north of range 17 west, October 12, 1915; township 21 north of range 18 west, March 8, 1916, and township 22 north of range 17 west, and township 22 north of range 18 west, March 15, 1916.

### VII.

That notwithstanding said lands were unsurveyed as aforesaid, the assessor of Flathead County in the year 1916 assessed said lands as the property of this plaintiff for the year 1915 for the purpose of taxation and pursuant to and by virtue of said assessment taxes were levied and imposed against said lands for the said year 1915 to the amount of \$3983.85.

### VIII.

That this plaintiff made application to the County Board of Equalization of said county, while in session as such board during the year 1916, to cancel said assessment for the reason that said lands were unsurveyed in the year 1915 and not subject to taxation, which application was in writing and verified by oath of the duly authorized agent of this plaintiff. Said application was denied and refused by said board.

### IX.

That on the 28th day of November, 1916, this plaintiff paid said taxes to the county treasurer of said county, said payment having been made under protest in writing upon the ground that said lands were unsurveyed lands during the year 1915 and not subject to taxation.

AND FOR A THIRD CAUSE OF ACTION PLAINTIFF ALLEGES:

That the plaintiff is and has been for several years a corporation organized and existing under and by virtue of the laws of the State of Wisconsin.

### II.

That the defendant is the duly elected, qualified and acting treasurer of the County of Flathead, State of Montana, and a resident and citizen of said state.

### III.

That this plaintiff is the owner of the following described lands situated in the County of Flathead, State of Montana, to-wit: All of sections 1, 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, 29, 31, 33 and 35, township 22 north of range 17 west; all of sections 1 and 3, township 21 north of range 18 west; all of sections 1, 3, 5, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, 29, 33 and 35, township 22 north of range 18 west.

### IV.

That said lands are situated within forty miles of the railroad line adopted by the Northern Pacific Railroad Company along which line the said company constructed, operated and maintained a railroad from a point on Lake Superior to a point at or near Portland, in the State of Oregon; and said lands were granted to said company by the Act of Congress approved July 2, 1864, entitled "An Act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound on the Pacific

Coast by the northern route."

#### V.

That the said Northern Pacific Railroad Company was the predecessor of this plaintiff in the ownership of said lands.

#### VI.

That on the first Monday of March, 1916, said lands, and all thereof, were unsurveyed. In the years 1913 and 1914 surveys of said lands and other lands in said townships were made in the field by the United States and plats of said survevs were approved by the Surveyor General of the United States for Montana, on June 12, 1915, and the same were approved by the Commissioner of the General Land Office on December 17, 1915, and duplicates of said plats so approved were filed in the land office at Kalispell, Montana, for the district in which said lands are situated, as follows: Township 21 north of range 18 west, March 8, 1916; township 22 north of range 17 west and township 22 north of range 18 west, March 15, 1916.

#### VII.

That notwithstanding said lands were unsurveyed as aforesaid, the assessor of Flathead County in the year 1916 assessed said lands as the property of this plaintiff for the year 1916 for the purpose of taxation and pursuant to and by virtue of said assessment taxes were levied and imposed against said lands for the said year 1916 to the amount of \$3951.37.

#### VIII.

That the plaintiff made application to the County Board of Equalization of said county, while in session as such board during the year 1916, to cancel said assessment for the reason that said lands were unsurveyed on the first Monday in March, 1916, and not subject to taxation, which application was in writing and verified by oath of the duly authorized agent of this plaintiff. Said application was denied and refused by said board.

#### IX.

That on the 28th day of November, 1916, this plaintiff paid said taxes to the county treasurer of said county, said payment having been made under protest in writing upon the ground that said lands were unsurveyed lands during the year 1916 and not subject to taxation.

WHEREFORE, plaintiff demands judgment against said defendant for the sum of \$8410.11, with interest from the 28th day of November, 1916, and costs of this action.

GUNN & RASCH, Attorneys for Plaintiff.

State of Montana, County of Lewis and Clark,—ss.

M. S. Gunn, being duly sworn, deposes and says:

That he is an officer of the above named plaintiff, to-wit, one of its division counsel for the State of Montana; that he has read the foregoing complaint and knows the contents thereof and that the same is true to the best of his knowledge, information and belief.

M. S. GUNN.

Subscribed and sworn to before me this 10th day of January, 1917.

[N. S.] W. W. PATTERSON,

Notary Public for the State of Montana. Residing at Helena, Montana. My commission expires May 6, 1917.

[ENDORSED]: Title of Court and Cause. Complaint. Filed January 11th, 1917. Geo. W. Sproule, Clerk. By C. R. Garlow, Deputy.

And thereafter, to-wit, on the 31st day of January, 1917, a demurrer was duly served and filed herein, which is entered of record as follows, to-wit:

In the District Court of the United States, for the District of Montana, Helena Division.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,

Plaintiff.

VS.

J. R. THOMPSON, as County Treasurer of Flathead County, Montana,

Defendant.

#### DEMURRER.

I.

Comes now the defendant and demurs to the first cause of action set forth and alleged in the

complaint herein on the ground that the same does not state facts sufficient to constitute a cause of action.

#### II.

Defendant further demurs to the second cause of action set forth and alleged in the complaint on the ground that the same does not state facts sufficient to constitute a cause of action.

#### III.

Defendant further demurs to the third cause of action set forth and alleged in the complaint on the ground that the same does not state facts sufficient to constitute a cause of action.

#### IV.

Defendant demurs to the complaint herein and the whole thereof, on the ground that the same does not state facts sufficient to constitute a cause of action.

#### C. H. FOOT AND T. H. MacDONALD,

County Attorney for Flathead County, and C. H. Foot, Attorneys for the Defendant.

[ENDORSED]: Title of Court and Cause. Demurrer. Filed January 31st, 1917. Geo. W. Sproule, Clerk. By C. R. Garlow, Deputy.

That thereafter said demurrer came on regularly for hearing, and oral argument was made and briefs filed on behalf of the plaintiff and defendant herein, and said demurrer was by the court taken under advisement, and that there-

after, to-wit, on the 27th day of June, 1917, the court filed herein its opinion in writing, which is in words and figures following, to-wit:

United States District Court, Montana. NORTHERN PACIFIC RAILWAY COMPANY.

vs.

THOMPSON, County Treasurer.

Plaintiff sues to recover taxes paid under protest, alleging the lands taxed are of its land grant, and were unsurveyed at and for the times for which the taxes were laid. Defendant demurs.

It appears that for all the lands the field work for survey was done prior to the annual dates fixing liability in general for taxes for the periods these taxes were levied. In some thereof the Commissioner of the General Land Office had approved the surveys and plats prior to said dates, and in some, he had not; but in none, were the plats filed in the local land office until after said dates.

It is conceded the lands are taxable when surveyed and not before. Plaintiff contends lands are not surveyed until plats approved by the Commissioner are filed in the local land office, citing:

U. S. v. Curtner, 38 Fed. 1; Lumber Co. v. Shoshone Co., 155 Fed. 613; Sawyer v. Gray, 205 Fed. 160;

U. S. v. Morrison, 240 U. S. 192.

Defendant contends that lands are surveyed so far as taxation is concerned, when the field work is done, citing Wells County v. McHenry, et al, (N. Dak.), 74 N. W. 241.

The court decides that lands are surveyed when the Commissioner approves the survey and plats.

Both parties cite Act July 10, 1886 (24 Stat. L. 143), which provides that grant lands shall not be exempt from taxation "on account of the lien of the United States" thereon for costs of survey, "but this provision shall not apply to lands unsurveyed."

It seems the only effect of this statute is to open to taxation surveyed grant lands though subject to said lien. The words withholding application of the statute to unsurveyed lands are unnecessary, superfluous and excessive legislative caution, in that unsurveyed lands are not exempt from taxation because of said lien, but because not carved out of lands of the United States. because they are not defined, made certain, and identified, because as they are undistinguishable from lands of the United States, taxes ostensibly upon them might actually be upon lands of the United States, always untaxable, and cause embarrassment to the possession and title of the United States and to its disposition of its lands, which no state administration was found to do. The reasons why unsurveyed grant lands are untaxable, are the same now as before the statute and depend not at all upon the statute.

The law requires the commissioner to survey the public lands. He supervises all surveys and none are completed until he approves. Though the field work be done and plats made all are but intermediate steps by his instruments, going for nothing unless he approves.

There is no survey until officially approved by him, and when he approves, the survey thereby is made and officially complete. His approval is judicial and a public record in the General Land Office. Thereafter, filing the plats in the local land office is interested, no part of the survey, and but to make the plats locally accessible for record of rights to and entries of the lands. True, until plats are so filed, the Commissioner can revoke his approval. But so can he after the plats are filed; and this latent power no more detracts from the effect of his approval accomplishing an officially completed survey, than does the power of a court over its decrees during term, from their finality.

When he approves the survey and plats, and not before, the lands lose the status of unsurveyed, carved out, identified and capable of reduction to the grantee's use. And doubtless the grantee then could first pay off the lien and secure patents.

There are expressions in cases cited by plaintiff, and in others, tending to support its contention. But they are unnecessary to the decisions or are in relation to priority of rights that can be initiated or asserted only after plats are filed. U. S. v. Morrison, *supra*, contains much recognizing surveys officially completed when approved

by the Commissioner. It is believed that the doctrine of relation relied on in Wells County v. Mc-Henry, et al, supra, was no application. It is the law of taxation that to be taxable, lands must be of taxable status at and for the time taxes are laid. A change in status from untaxable to taxable, occurring subsequent to said time, will not relate back so as to subject them to taxation at and for the said earlier time, but only opens the lands to taxes thereafter accruing.

Demurrer overruled as to counts one and two, and sustained as to count three.

BOURQUIN, J.

[ENDORSED]: Memo. On demurrer. Filed June 27, 1917. Geo. W. Sproule, Clerk. By C. R. Garlow, Deputy.

In the District Court of the United States, for the District of Montana. (Helena Division.)

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,

Plaintiff,

vs.

J. R. THOMPSON, as County Treasurer Flathead County, Montana,

Defendant.

Herein, court this day ordered that the demurrer to the complaint be overruled as to counts one and two and sustained as to count three, in accordance with memoranda decision filed.

Entered in open court June 28, 1917.

GEO. W. SPROULE, Clerk.

And thereafter, to-wit, on July 17, 1917, said defendant duly served and filed herein its answer to said complaint, which answer is in words and figures following, to-wit:

In the District Court of the United States, for the District of Montana, Helena Division.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, Plaintiff,

VS.

J. R. THOMPSON, as County Treasurer of Flathead County, Montana,

Defendant.

#### ANSWER.

Comes now the Defendant and for answer to the Complaint herein, admits as follows, to-wit:

FIRST: Admits each and every allegation, matter and thing in Plaintiff's first cause of action alleged.

SECOND: Admits each and every allegation, matter and thing in Plaintiff's second cause of action alleged.

THIRD: Admits each and every allegation, matter and thing in Plaintiff's third cause of action alleged.

WHEREFORE, Defendant having fully answered prays judgment against the Plaintiff that he go hence with his costs and that Plaintiff take nothing by this action.

T. H. MacDONALD,

County Attorney for Flathead County, Attorney for Defendant.

STATE OF MONTANA,

County of Flathead,—ss.

T. H. MacDonald, being first duly sworn, deposes and says: that he is the duly and regularly elected, qualified and acting County Attorney of Flathead County, State of Montana; that he makes this verification as such County Attorney; that he has read the foregoing Answer and knows the contents thereof and that the same is true according to his best knowledge, information and belief.

T. H. MacDONALD.

Subscribed and sworn to before me this sixteenth day of July, in the year One Thousand Nine Hundred and Seventeen.

[N. S.] C. H. FOOT,

Notary Public for the State of Montana. Residing at Kalispell, Montana. My commission expires Aug. 21st, 1918.

[ENDORSED]: Title of Court and Cause. Answer. Filed July 17, 1917. Geo. W. Sproule, Clerk.

And thereafter, to-wit, on October 5, 1917, the plaintiff served and filed herein its motion for judgment on the pleadings, which said motion is in words and figures following, to-wit:

In the District Court of the United States, for the District of Montana, Helena Division.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, Plaintiff,

J. R. THOMPSON, as County Treasurer of Flathead County, Montana,

Defendant.

MOTION FOR JUDGMENT ON THE PLEAD-INGS.

I.

Now comes the plaintiff above named and moves the court for judgment on the pleadings as to the first cause of action contained in plaintiff's complaint on file herein upon the ground that all the allegations in said cause of action are admitted in the answer on file herein.

H.

Moves the court for judgment on the pleadings as to the second cause of action contained in plaintiff's complaint on file herein upon the ground that all the allegations in said cause of action are admitted in the answer on file herein.

III.

Moves the court for judgment on the pleadings as to the third cause of action contained in plaintiff's complaint on file herein upon the ground that all the allegations in said cause of action are admitted in the answer on file herein.

This motion will be based upon the complaint and answer on file herein.

GUNN, RASCH & HALL, Attorneys for Plaintiff.

[ENDORSED]: Motion. Filed Oct. 5th, 1917. Geo. W. Sproule, Clerk.

And thereafter, to-wit, on the 5th day of October, 1917, there was filed herein a stipulation for the submission of said motion to the court for decision, which said stipulation is in words and figures as follows:

In the District Court of the United States, for the District of Montana, Helena Division.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,

Plaintiff,

VS.

J. R. THOMPSON, as County Treasurer of Flathead County, Montana,

Defendant.

#### STIPULATION.

It is hereby stipulated and agreed that the motion of the plaintiff on file herein for judgment on the pleadings may be submitted on the arguments made and briefs submitted by the parties hereto at the hearing of the demurrer to plaintiff's complaint.

DATED this 29th day of September, 1917.

GUNN, RASCH & HALL, Attorneys for Plaintiff.

T. H. MacDONALD,

Attorney for Defendant.

[ENDORSED]: Stipulation. Filed Oct. 5th, 1917. Geo. W. Sproule, Clerk.

That thereafter, pursuant to said stipulation, said motion was submitted to the court and there-

after, to-wit, on the 5th day of October, 1917, the court wrote its opinion on the bottom of said motion, which opinion is in words and figures following, to-wit:

For reasons, decision of June 27, 1917, motion granted in respect to counts one and two, and denied, count three.

October 5, 1917.

BOURQUIN, J.

And thereafter, to-wit, on October 9, 1917, judgment was duly rendered and entered herein in words and figures following, to-wit:

In the District Court of the United States, for the District of Montana. (Helena Division.)

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,

Plaintiff.

V.

J. R. THOMPSON, as County Treasurer of Flathead County, Montana,

Defendant.

#### JUDGMENT.

The above entitled cause having come on regularly for hearing on the motion of plaintiff for judgment on the pleadings as to each cause of action stated in the complaint, and said cause having been submitted for final decision and judgment on said motion and the court having on the 5th day of October, 1917, rendered its judgment granting said motion as to the first and second causes of action and denying said motion as to the third cause of action, it is now ORDERED, ADJUDGED AND DECREED that the plaintiff have and recover of and from the defendant on the first and second causes of action set out in said complaint, the sum of \$4767.83, with interest thereon at the rate of eight per cent per annum from the date hereof until paid, together with plaintiff's costs and disbursements incurred in this action taxed in the sum of \$28.60, and it is further ORDERED, ADJUDGED and DECREED that the said complaint be and the same is hereby dismissed as to the third cause of action.

ENTERED October 9th, 1917.

GEO. W. SPROULE,

Clerk.

[ENDORSED]: Judgment. Filed Oct. 9th, 1917. Geo. W. Sproule, Clerk.

And thereafter, on November 5, 1917, petition for a writ of error was duly filed herein, which is in the words and figures following, to-wit:

In the District Court of the United States, for the District of Montana. (Helena Division.)

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,

Plaintiff,

VS.

J. R. THOMPSON, as County Treasurer, Flathead County, Montana,

Defendant.

#### PETITION FOR WRIT OF ERROR AND SUPER-SEDEAS.

The Northern Pacific Railway Company, the plaintiff in the above entitled cause, feeling itself aggrieved by the judgment entered herein on the 9th day of October, 1917, dismissing the complaint on file herein as to the third cause of action stated therein and denving any relief thereon, comes now by Gunn, Rasch & Hall, its attornevs, and petitions the above entitled court for an order allowing said plaintiff to prosecute a writ of error to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided, and also that an order be made fixing the amount of security which the plaintiff shall give and furnish upon said writ of error, and that upon the giving of such security all further proceedings in this court be suspended and staved until the determination of said writ of error by the United States Circuit Court of Appeals for the Ninth Circuit.

And your petitioner will ever pray.

GUNN AND RASCH,

Attorneys for Plaintiff.

ALLOWED this 5th day of November, 1917.

BOUROUIN,

Judge.

[ENDORSED]: Title of Court and Cause. Petition for Writ of Error and Supersedeas. Filed November 5th, 1917. Geo. W. Sproule, Clerk. By

C. R. Garlow, Deputy.

And thereafter, on November 14, 1917, plaintiff filed its assignment of errors herein, which is in the words and figures following, to-wit:

In the District Court of the United States, for the District of Montana. (Helena Division.)

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,

Plaintiff.

VS.

J. R. THOMPSON, as County Treasurer Flathead County, Montana,

Defendant.

ASSIGNMENT OF ERRORS.

Comes now the plaintiff, Northern Pacific Railway Company, plaintiff in error, and files the following assignment of errors upon which it will rely upon its prosecution of the writ of error in the above entitled cause:

T

That the United States District Court for the District of Montana, Ninth Circuit, erred in sustaining the demurrer of the defendant to the third cause of action stated in the complaint of the plaintiff in error herein for the reason that said cause of action states facts sufficient to constitute a cause of action.

II.

That the said court erred in overruling and denying the motion of the plaintiff in error herein for judgment on the pleadings as to the third cause of action stated in the complaint on file herein for the reason that said cause of action states facts sufficient to constitute a cause of action.

WHEREFORE, the said Northern Pacific Railway Company, plaintiff, and plaintiff in error, prays that the judgment of the District Court of the United States for the District of Montana dismissing the complaint herein as to the third cause of action stated therein and denying any relief thereon be reversed and that the said District Court be directed to grant said motion of the plaintiff in error for judgment on the pleadings as to said third cause of action.

GUNN AND RASCH,

Attorneys for Plaintiff and Plaintiff in Error.

[ENDORSED]: Title of Court and Cause. Assignment of Errors. Filed November 14th, 1917. Geo. W. Sproule, Clerk. By E. Baker, Deputy.

And thereafter, on November 12, 1917, a Writ of Error was duly issued herein, which is in the words and figures following, to-wit:

#### WRIT OF ERROR.

#### UNITED STATES OF AMERICA,—SS.

The President of the United States, to the Honorable, the Judge of the District Court of the United States for the District of Montana, GREETING:

Because, in the record and proceedings, as also

in the rendition of the judgment of a plea which is in said District Court, before you, between Northern Pacific Railway Company, plaintiff, and J. R. Thompson, as County Treasurer of Flathead County, Montana, defendant, a manifest error hath happened, to the great damage of the said Northern Pacific Railway Company, plaintiff in error, as is said and appears by the petition herein:

We, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, on the 5th day of December next, in the said Circuit Court of Appeals, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct these errors what of right and according to the laws and customs of the United States, should be done.

WITNESS the Honorable EDWARD DOUG-LASS WHITE, Chief Justice of the Supreme Court of the United States, the 12th day of November, 1917, the one hundred and forty-second year of the Independence of the United States of America.

(Court Seal)

GEO. W. SPROULE,

# ANSWER COURT TO WRIT OF ERROR.

The answer of the Judge of the District Court of the United States for the District of Montana.

The record and all proceedings of the plaintiff in error, wherein mention is within made, with all things touching the same, I hereby certify, under the seal of said Court, to the United States Circuit Court of Appeals for the Ninth Circuit within mentioned, at the day and place within contained, in a certain schedule to this writ annexed, as within I am commanded.

By the Court.

(Seal)

GEO. W. SPROULE, Clerk. By C. R. GARLOW, Deputy.

his attorney and County Attorney for Flathead County, Montana:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the in the rendition of the judgment of a plea which is in said District Court, before you, between Northern Pacific Railway Company, plaintiff,

should be done.

WITNESS the Honorable EDWARD DOUG-LASS WHITE, Chief Justice of the Supreme Court of the United States, the 12th day of November, 1917, the one hundred and forty-second year of the Independence of the United States of America.

(Court Seal) GEO. W. SPROULE,

Clerk of the United States District Court for the District of Montana, Ninth Circuit.

By C. R. GARLOW,

Deputy Clerk.

ALLOWED this 12th day of November, 1917.

BOURQUIN,

District Judge.

Service of the within Writ of Error and receipt of a copy thereof is hereby admitted this 19th day of November, 1917.

> C. H. FOOT & T. H. MacDONALD, Attorneys for Defendant in Error.

[Endorsed]: Title of Court and Cause: Writ of Error. Filed November 13, 1917. Geo. W. Sproule, Clerk. E. Baker, Deputy.

And on November 5, 1917, a Citation was duly issued herein, which is hereto attached and is in the words and figures following, to-wit:

#### CITATION.

UNITED STATES OF AMERICA,—SS.

To J. R. Thompson, as County Treasurer of Flathead County, Montana, and T. H. MacDonald, his attorney and County Attorney for Flathead County, Montana:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California. on the 5th day of December, 1917, pursuant to a writ of error on file in the clerk's office of the District Court of the United States, of the Ninth Judicial Estrict, in and for the District of Montana, in that certain action No. 567, wherein Northern Pacific Railway Company, a corporation, is plaintiff in error, and you, J. R. Thompson, as County Treasurer of Flathead County, Montana, are defendant in error, to show cause, if any there be, why the judgment given, made and rendered against the said Northern Pacific Railway Company, in the said writ of error mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable EDWARD DOUG-LASS WHITE, Chief Justice of the Supreme Court of the United States of America, this 5th day of November, 1917, and of the Independence of the United States the one hundred and fortysecond. BOURQUIN,

United States District Judge for Montana. Service of the foregoing citation is hereby acknowledged this 19th day of November, 1917.

C. H. FOOT & T. H. MacDONALD,

County Attorney for Flathead County, Montana, and Attorney for Defendant in Error.

[ENDORSED]: Title of Court and Cause. Citation. Filed Nov. 28, 1917. Geo. W. Sproule, Clerk. By E. Baker, Deputy.

On November 5, 1917, there was signed and filed herein an order fixing the amount of bond on Writ of Error, which said bond is in the words and figures following, to-wit:

In the District Court of the United States for the District of Montana. (Helena Division.)

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,

Plaintiff,

VS.

J. R. THOMPSON, as County Treasurer Flathead County, Montana,

Defendant.

ORDER FIXING AMOUNT OF BOND ON WRIT OF ERROR.

The plaintiff, Northern Pacific Railway Company, having this day filed its petition for a writ of error from the judgment made and entered herein on the 9th day of October, 1917, dismissing the complaint on file herein as to the third cause of action stated therein and denying any relief thereon, to the United States Circuit Court of Appeals in and for the Ninth Judicial Circuit. together with an assignment of errors, in due time, and also praying that an order be made fixing the amount of security which plaintiff should give and furnish upon said writ of error, and that upon the giving of said security, all further proceedings of this court be suspended and stayed until the determination of said writ of error by said United States Circuit Court of Appeals

in and for the Ninth Judicial Circuit, and said petition having this day been duly allowed:

Now, Therefore, it is Ordered that upon the said plaintiff, Northern Pacific Railway Company, filing with the clerk of this court a good and sufficient bond in the sum of three hundred (\$300) dollars, to the effect that if the said plaintiff, Northern Pacific Railway Company, and plaintiff in error, shall prosecute the said writ of error to effect, and answer all damages and costs if it fails to make its appeal good, then the said obligation to be void; else to remain in full force and virtue, the said bond to be approved by the court, then further proceedings in this court be, and they hereby are, suspended and stayed until the determination of said writ of error by the said United States Circuit Court of Appeals.

DATED this 5th day of November, 1917.

BOURQUIN, Judge.

[ENDORSED]: Title of Court and Cause. Order. Filed Nov. 5th, 1917. Geo. W. Sproule, Clerk. By C. R. Garlow, Deputy.

On November 7, 1917, Bond on Writ of Error was duly approved and filed herein and is in the words and figures following, to-wit:

In the District Court of the United States for the District of Montana. (Helena Division.)

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,

Plaintiff,

J. R. THOMPSON, as County Treasurer Flathead County, Montana,

Defendant.

#### BOND ON WRIT OF ERROR. KNOW ALL MEN BY THESE PRESENTS:

That we, Northern Pacific Railway Company, as principal, and National Surely Company, a Corporation organized and existing under and by virtue of the laws of the State of New York and authorized to execute bonds and undertakings in the State of Montana, as surety, are held and firmly bound unto J. R. Thompson, as County Treasurer of Flathead County, Montana, the defendant above named, in the sum of Three Hundred (\$300.00) Dollars, to be paid to the said J. R. Thompson, as County Treasurer of Flathead County, Montana, for which payment well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our successors and assigns, firmly by these presents. SEALED with our seals and dated the 6th day of November, 1917.

WHEREAS, the above named plaintiff, Northern Pacific Railway Company, has sued out a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment in the above entitled cause by the District Court of the United States, for the District of Montana, Ninth Circuit, dismissing the complaint on file herein as to the third cause of action therein stated and denying any relief thereon:

Now, Therefore, the condition of this obligation is such that if the above named Northern Pacific Railway Company shall prosecute said writ to effect and answer all costs and damages, if it shall fail to make good its appeal, then this obligation shall be void; otherwise to remain in full force and virtue.

NORTHERN PACIFIC RAILWAY COMPANY, By CARL RASCH.

> One of Its Division Counsel Hereunto duly authorized,

> > Principal.

NATIONAL SURETY COMPANY,

(Seal) By ROBERT S. KING, Its Attorney in Fact,

Surety.

The foregoing bond is hereby approved this 7th day of November, 1917.

BOURQUIN,

Judge.

[ENDORSED]: Title of Court and Cause. Bond on Writ of Error. Filed November 7th, 1917. Geo. W. Sproule, Clerk. By C. R. Garlow, Deputy.

And thereafter, on November 19, 1917, defendant duly served and thereafter filed herein its Praecipe for Transcript of Record, which is in words and figures following, to-wit:

In the District Court of the United States for the District of Montana. (Helena Division.)

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,

Plaintiff,

VS.

J. R. THOMPSON, as County Treasurer Flathead County, Montana,

Defendant.

PRAECIPE FOR TRANSCRIPT OF RECORD.

To C. H. Foot and T. H. MacDonald, Attorneys for the above named defendant and defendant in error, and George W. Sproule, clerk of said court:

You, and each of you, will please take notice that the undersigned, the attorneys for the plaintiff and plaintiff in error above named, hereby serve upon you and each of you this praccipe in conformity with the rules of court, to indicate to you the portions of the records and files in the above entitled cause which said plaintiff and plaintiff in error desires to and will incorporate in its transcript of record on writ of error herein. to-wit, the writ of error issued herein on the 12th day of November, 1917, to have the judgment before rendered and entered herein reviewed by the United States Circuit Court of Appeals for the Ninth Circuit, and the Clerk of said District Court will incorporate and include in said transcript the following:

1. Complaint, demurrer thereto, decision of court on said demurrer, order overruling demurrer as to first two causes of action and sustaining

it as to 3rd cause of action, motion for judgment on pleadings, stipulation that said motion may be submitted on the arguments made and briefs filed at the time of the argument on demurrer to complaint, decision of court on said motion, and judgment.

- 2. Petition for writ of error and order allowing same.
- 3. Assignment of errors filed with petition for writ of error.
- 4. Writ of error and acknowledgment of service by defendant.
- 5. Citation on writ of error and acknowledgement of service by defendant.
- 6. Order fixing amount of bond on writ of error.
  - 7. Bond on writ of error.
  - 8. Copy of this praccipe.

#### GUNN, RASCH & HALL,

Attorneys for Plaintiff and Plaintiff in Error.

Service of the foregoing practipe and receipt of a copy thereof this 19th day of November, 1917, is hereby admitted and acknowledged.

#### C. H. FOOT & T. H. MacDONALD.

Attorneys for Defendant and Defendant in Error. [ENDORSED]: Title of Court and Cause. Praecipe. Filed Nov. 28, 1917. Geo. W. Sproule, Clerk. E. Baker, Deputy.

### CLERK'S CERTIFICATE TO TRANSCRIPT OF RECORD

UNITED STATES OF AMERICA,

District of Montana,—ss.

I. George W. Sproule, Clerk of the United States District Court of the District of Montana, do hereby certify and return to the Honorable the United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume consisting of 34 pages, numbered consecutively from 1 to 34, both inclusive, is a true and correct transcript of all pleadings, decisions, and of all proceedings in said cause required to be incorporated in the record on writ of error by the praecipe of plaintiff in error for said record, and consists of full, true, correct and complete copies of the complaint, demurrer to complaint, decision on said demurrer, answer, motion for judgment on the pleadings, stipulation for the submission of said motion on the arguments made and brief submitted at the hearing of said demurrer, decision on said motion, judgment, petition for writ of error and order allowing same, assignment of errors, writ of error, citation, order fixing amount of bond on writ of error, bond on writ of error, praecipe for record, and of the whole thereof, as the same appear from the original records and files of said court in my possession as such clerk; and I do further certify and return that I have annexed to said transcript and included within the paging thereof the original

writ of error and citation issued in said cause.

I further certify that the costs of the transcript of record amount to the sum of Eighten 4. The Dollars, and have been made a charge against plaintiff in error.

Gow Spronle
Clerk.
By & R. Garlow

(Seal)

Deputy Clerk.

# United States Circuit Court of Appeals

for the Rinth Circuit.

NORTHERN PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

VS.

J. R. THOMPSON, as County Treasurer of Flathead County, Montana,

Defendant in Error.

and

J. R. THOMPSON as County Treasurer of Flathead County, Montana,

Plaintiff in Error.

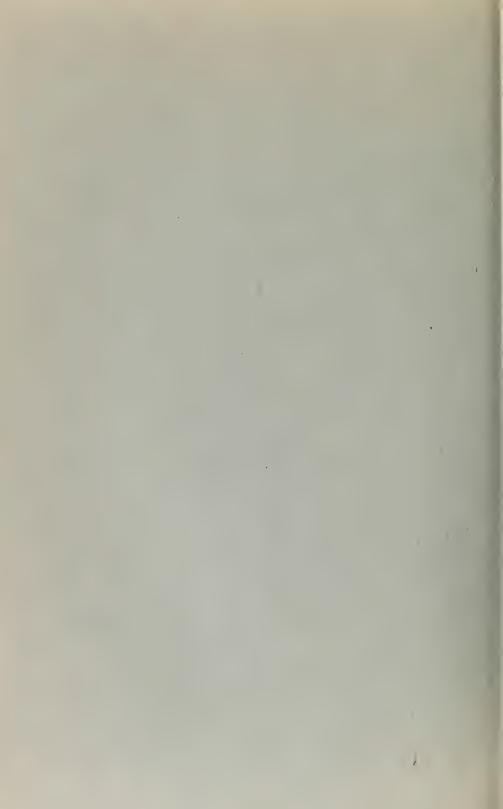
VS.

NORTHERN PACIFIC RAILWAY COMPANY, Defendant in Error.

Brief of Northern Pacific Kailway.
Company

GUNN & RASCH.

Attorneys for Northern Pacific Railway Company



### United States

## Circuit Court of Appeals

for the Rinth Circuit.

NORTHERN PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

VS.

J. R. THOMPSON, as County Treasurer of Flathead County, Montana,

Defendant in Error,

and

J. R. THOMPSON as County Treasurer of Flathead County, Montana,

Plaintiff in Error.

vs.

NORTHERN PACIFIC RAILWAY COMPANY, Defendant in Error.

#### STATEMENT OF FACTS

The complaint in this case embraces three causes of action. Judgment was rendered in favor of the railway company on the first and second causes of action and against the railway company on the third cause of action. The case is before this court on a writ of error issued in be-

half of the railway company to review the judgment dismissing the complaint as to the third cause of action and on cross-writ of error issued in behalf of the county treasurer of Flathead County to review the judgment in favor of the railway company.

The several causes of action in the complaint are for the recovery of taxes paid under protest. The lands against which the taxes were imposed are the property of the railway company and were granted to the Northern Pacific Railroad Company, predecessor of the Northern Pacific Railway Company, by the Act of Congress approved July 2, 1864, entitled "An Act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound on the Pacific Coast by the northern route." The first cause of action is for the recovery of taxes paid for the year 1914, the second cause of action for the recovery of taxes paid for the year 1915, and the third cause of action for the recovery of taxes paid for the year 1916. Paragraph VI of the first cause of action reads as follows:

"That during the entire year 1914 said lands, and all thereof, were unsurveyed. In the year 1913 and during the months of September and October thereof surveys of said lands and other lands in said townships were made in the field by the United States and on December 14, 1914, the plats of said surveys were approved by the Surveyor General of the United States for Montana, and on June

17, 1915, said plats were approved by the Commissioner of the General Land Office and on October 12, 1915, duplicates of the said plats so approved were filed in the land office at Kalispell, Montana, for the district in which said lands are situated." (Rec. p. 3).

Paragraph VI of the second cause of action reads as follows:

"That during the year 1915 said lands, and all thereof, were unsurveyed. In the year 1913 and 1914 surveys of said lands and other lands in said townships were made in the field by the United States and plats of said surveys were approved by the Surveyor General of the United States for Montana, as follows: Township 21 north of range 15 west and township 21 north of range 17 west. December 14, 1914; township 21 north of range 18 west, township 22 north of range 17 west and township 22 north of range 18 west. June 12. 1915; and said plats were approved by the Commissioner of the General Land Office as follows: Township 21 north of range 15 west, and township 21 north of range 17 west, June 7, 1915; township 21 north of range 18 west, township 22 north of range 17 west and township 22 north of range 18 west. December 17, 1915; and duplicates of said plats so approved were filed in the land office at Kalispell, Montana, for the district in which said lands are situated, as follows: Township 21 north of range 15 west and township 21 north of range 17 west, October 12, 1915; township 21 north of range 18 west, March 8, 1916, and township 22 north of range 17 west, and township 22 north of range 18 west, March 15, 1916," (Rec. pp. 6 and 7).

Paragraph VI of the third cause of action is as follows:

"That on the first Monday of March, 1916, said lands and all thereof, were unsurveyed. In the years 1913 and 1914 surveys of said lands and other lands in said township were made in the field by the United States and plats of said surveys were approved by the Surveyor General of the United States for Montana, on June 12, 1915, and the same were approved by the Commissioner of the General Land Office on December 17, 1915, and duplicates of said plats so approved were filed in the land office at Kalispell, Montana, for the district in which said lands are situated as follows: Township 21 north of range 18 west, March 8, 1916; township 22 north of range 17 west and township 22 north of range 18 west, March 15, 1916." (Rec. p. 9).

In each cause of action it is alleged that the taxes were paid under protest. The action was commenced and prosecuted pursuant to section 2742 of the Revised Codes of Montana of 1907, as amended by an act approved March 10, 1909, providing that taxes which are deemed unlawful may be paid under protest and an action commenced to recover same within sixty days after the 30th day of November of the year in which such taxes are paid (Supplement of 1915 to Revised Codes of Montana, page 438).

A demurrer was interposed to each cause of action and was overruled as to the first and second causes of action and sustained as to the third cause of action (Rec. pp. 11 to 16). Thereupon an answer was filed admitting the allegations of

each cause of action (Rec. p. 17). A motion was filed in behalf of the railway company for judgment on the pleadings and the case was submitted for final decision on this motion (Rec. p. 19). The motion was granted as to the first and second causes of action and denied as to the third cause (Rec. p. 20), and judgment was rendered accordingly (Rec. p. 21).

It is only property in existence and property which has a taxable status at twelve o'clock noon on the first Monday in March of any year that may be taxed for that year.

Sections 2510 and 2511 of the Revised Codes of Montana of 1907.

The district court decided that the approval of the plats of the surveys of the lands in question by the commissioner of the general land office made such lands subject to taxation. (Rec. p. 15). It was in consequence of this decision that a recovery was allowed on the first and second causes of action and denied as to the third cause of action.

#### SPECIFICATIONS OF ERROR.

- 1. The district court erred in deciding that the lands described in the third cause of action were subject to taxation for the year 1916.
- 2. The district court erred in denying the motion of the railway company for judgment on the pleadings as to the third cause of action.

#### ARGUMENT.

As the entire case is before this court, we will consider and discuss the right of recovery upon all the causes of action stated in the complaint.

Prior to the Act of Congress of July 10, 1886, entitled "An Act to provide for taxation of rail-road-grant lands, and for other purposes," lands granted to the Northern Pacific Railroad Company were not subject to state taxation until surveyed and the cost of making the survey paid.

Northern Pacific Ry. Co. vs. Rockne, 115 U. S. 600.

Section 1 of the Act of Congress of July 10, 1886, provided as follows:

"No lands granted to any railroad corporation by any act of Congress shall be exempt from taxation by States, Territories, and municipal corporations on account of the lien of the United States upon the same for the costs of surveying, selecting, and conveying the same, or because no patent has been issued therefor, but this provision shall not apply to lands unsurveyed: Provided, That any such land sold for taxes shall be taken by the purchaser subject to the lien for costs of surveying, selecting, and conveying, to be paid in such manner by the purchaser as the Secretary of the Interior may by rule provide and to all liens of the United States, all mortgages of the United States, and all rights of the United States in respect of such lands; Provided, further, That this act shall apply only to lands situated opposite to and coterminous with completed portions of said roads. and in organized counties; Provided further, That at any sale of lands under the provisions

of this act the United States may become a preferred purchaser, and in such case the lands sold shall be restored to the public domain and disposed of as provided by the laws relating thereto. (24 Stat. 143)."

After the enactment of this law all surveyed lands within the general description of the grant to the Northern Pacific Railroad Company became subject to state taxation.

N. P. Railway Co. vs. Myers, 172 U. S. 589.

It will be noted that the section just quoted expressly exempts from its operation unsurveyed lands and impliedly declares that such lands shall not be taxed. But however this may be, as it is impossible to locate or identify the lands granted to the Northern Pacific Railroad company until surveyed it follows that they cannot be taxed by virtue of state laws before they have been surveyed.

Clearwater Timber Co. v. Shoshone County, Idaho, 155 Fed. 612;

Sawyer v. Gray, 205 Fed. 160;

State v. Central Pac. Ry. Co., 25 Pac. (Nev.) 442:

Smith v. City of Los Angeles, 112 Pac. (Cal.) 307.

As the lands in question were not subject to taxation until surveyed, the question for decision is, When did they acquire the status of surveyed lands?

In the case of United States v. Morrison, 240 U. S. 192, the court said:

"The surveying of the public lands is an administrative act confided to the control of the Commissioner of the General Land Office under the direction of the Secretary of the Interior. Act of July 4, 1836, chap. 352, 5 Stat. at L. 107, Rev. Stat. sec. 453, Comp. Stat. 1913, sec. 699. It was competent for the Commissioner, acting within this authority, to direct how surveys should be made, and to require that they should be subject to his examination and approved before they were filed as officially complete in the local land office." (Citing cases.) \* \* \* \* \*

"By order of April 17, 1879, the Commissioner required that surveyors general should not 'file the duplicate plats in the local land offices until the duplicates have been examined in this office and approved,' and the survevors general 'officially notified to that effect.' Re F. A. Hyde & Co., 37 Land Dec. 165. It cannot be doubted that this requirement was within the authority of the Commissioner (see Tubbs v. Wilholt, 138 U. S. 134. 143, 144, 34 L. ed. 887, 890, 891, 11 Sup. Ct. Rep. 279); and it necessarily follows that the making of the field survey and its approval by the surveyor general of Oregon did not make the survey complete as an official act. It still remained subject to the examination and approval of the Commissioner, and for that purpose copies of the plat of survey and field notes were transmitted to the Commissioner, who, not being satisfied, required a supplemental report."

In the case of Anderson v. State of Minnesota, 37 Land Dec. 390, it was decided that public lands are not surveyed until the approved plat of survey is officially filed in the local land office. In the opinion it is said:

"The General Land Office circular of January 25, 1904, relative to notice of filing plats

of survey, provides that:

Hereafter when an approved plat of the survey of any township is transmitted to the register and receiver by the surveyor general they will not regard such plat as officially received and filed in their offices until the following regulations have been complied with: (1) They will forthwith post a notice in a conspicuous place in their office specifying the township that has been surveyed, and stating that the plat of survey will be filed in their office on a day to be fixed by them and named in the notice, which shall not be less than thirty days from the date of such notice, and that on and after such day they will be prepared to receive applications for the entry

of lands in such township.

In the case of F. A. Hyde and Company (37) L. D., 164), but recently decided by this Department, it was held upon the authority of Knight v. United States Land Association (142 U. S. 161, 182), and Michigan Land & Lumber Co. v. Rust (168 U. S. 589, 594), that the power of the Secretary of the Interior to impose regulations for guidance of his subordinates in the land department does not admit of question, and that under surveying regulations, lands are not surveyed or identified until approval of the plat of survey and filing of the plat by your direction in the local land office. It seems, therefore, to be quite clear that within the meaning of the law and regulations thereunder there is no survev of public lands until the approved plat thereof has been filed in the local land office. (See Barnard's Heirs v. Ashley's Heirs et al., 18 How., 43). It is also equally clear that under the authorized regulations above quoted the receipt of the plat at the district land office does not constitute a filing thereof. The notice which the local land office is required to publish merely states that the plat has been received and that it 'will be filed in their office on a day to be fixed by them and named in the notice'."

It has always been the holding of the land department that a survey is not effective and does not become final until the plat is filed in the local land office and this holding has been accepted by the courts as correct.

Tubbs v. Wilhoit, 138 U. S. 134; Frasher v. O'Connor, 115 U. S. 102; United States v. Curtner, 38 Fed. p. 1.

In the case of United States v. Curtner, cited above, in an opinion by Circuit Judge Sawyer, concurred in by Justice Field, it is said:

"The lands in question lying in township 3 S., stand in no different situation from those in township 2 S., except that they were surveyed in the field by the United States deputy-surveyor in August, 1862, and a plat thereof was made and approved by the surveyor general on December 24, 1862; but a certified copy was not filed in the office of the register of the land office of the district embracing the lands until June 4, 1869. This plat (so filed in 1869) is regarded by the interior department as official, and the survey as made of the date of filing. approved by the surveyor general December 18, 1865, however, was filed in the district land office on December 28, 1865, this being the first plat filed in that office; but this map is not regarded by the interior department as official, as it had not at that time been approved and adopted by the department. Were it otherwise, this filing was too late. Unless the actual survey in the field, and making and approving a plat by the surveyor general without filing it, or a certified copy of it, in the local land office, places the lands in the category of surveyed lands in contemplation of law, then these lands were also seselected before they were surveyed by the United States, and the selections were void. The Interior Department did not regard the survey as official until the certified copy of the official plat was filed by direction of the department in the local land office. June 4. Whether this is to be regarded as the date of the survey or not, we are satisfied that the lands could not be regarded as legally surveyed in such sense as to open them to selection, location, sale, or other disposition till the approved copy of the plat was filed on December 28, 1865. This is the earliest date at which they could be considered open to selection, if open to selection then. land office was the place for the disposition and record of the public lands; and until they had an authentic official plat of the surveys of the public land, it would be impracticable to keep a record of them or of their disposition. If we are correct in this view, then no valid selection could be made, at the earliest, till December 28, 1865, and this was several months after the grant to the railroad company had indefeasibly attached."

In the case of Sawyer v. Gray, 205 Fed. 160, District Judge Cushman said:

"The township plat having been filed in April, 1901, the lands in dispute were unsurveyed at the time of the first alleged selection, in March, 1900. The government survey creates, not merely identifies, sections of land. There were no such lands as those described in the first application at the time of selection."

This court will take judicial notice of the rules and regulations requiring approval of surveys by the commissioner of the general land office, and with reference to the filing of the plats of surveys in the local land office of the district in which the land is situated.

> Cosmos Exploration Co. v. Gray Eagle Oil Co., 190 U. S. 301; Caha v. United States, 152 U. S. 211; Leonard v. Lennox, 181 Fed. 760.

Lands granted to the Northern Pacific Railroad Company are regarded and treated as public lands of the United States until surveyed.

U. S. vs. Montana Lumber & Mfg. Co., 196U. S. 573;Carroll v. United States, 154 Fed. 425.

The grant made to the Northern Pacific Railroad Company was a grant *in praesenti* and legal title to the lands granted passed from the United States upon the identification of the lands.

> Deseret Salt Co. v. Tarpey, 142 U. S. 241; Northern Pacific Ry. Co. v. Myers, 172 U. S. 589;

> U. S. v. Montana Lumber Mfg. Co., 196 U. S. 573.

After survey and before patent issues the railway company can maintain ejectment to recover possession.

Northern Pacific Ry. Co. v. Myers, 172 U. S. 589.

Until the survey is complete and becomes final it may be rejected and a new survey ordered.

City of New Orleans v. Paine, 147 U. S. 261.

In the case just cited the court said:

"If the department was not satisfied with this survey, there was no rule of law standing in the way of its ordering another. Until the matter is closed by final action, the proceedings of an officer of the department are as much open to review or reversal by himself, or his successor, as are the interlocutory decrees of a court open to review upon the final hearing."

Where the map of a survey has been filed in the local land office and a patent is issued for lands identified by, and embraced within, the survey, or the legal title attaches to land embraced within the survey by virtue of a grant already made, the jurisdiction of the land department ceases as to such land.

> Moore v. Robbins, 96 U. S. 530; Peyton v. Desmond, 129 Fed. pp. 1-8.

In the opinion in the case last cited the court said:

"The issuance of a patent, or such other act as passes the legal title from the government, is the final act, and is the expression and entry of the final judgment of the officers of the Land Department; and this is the act that marks the termination of the jurisdiction of these officers and the beginning of the jurisdiction of the courts." (Citing many cases.)

In the opinion in the case of United States v. Morrison, 240 U. S. 192, the court said:

"Reference is made to the terms of the territorial act of 1848 (supra) with respect to the reservation of the described sections when the lands were 'surveyed \* \* \* \* preparatory to bringing the same into market,' but this provision furnishes no ground for the contention that an incomplete and unapproved survey was intended. Much less can it be said that, under the grant of the enabling act of 1859, the title would pass at any intermediate stage of the survey. Nor is there merit in the contention that is based on sec. 2275 of the Revised Statutes as amended by the act of February 28, 1891 (supra), protecting settlements when made 'before the survey of the lands in the field.' That act imposes no limitation upon the authority of Congress to dispose of the lands before title passes to the state; and if title passes upon survey, it must be upon a survey duly completed according to the authorized regulations of the Department. It is said, however, that in this case the plat was officially used by the Commissioner of the General Land Office and the Secretary of the Interior in connection with the withdrawal under consideration, and hence that the survey must be deemed to have been officially approved. Wright v. Roseberry, 121 U. S. 488, 517, 30 L. ed. 1039, 1047, 7 Sup. Ct. Rep. 985; Tubbs v. Wilhoit, supra. It is true that the lands withdrawn were conveniently described according to townships, and that the official correspondence referred to an accompanying diagram showing the townships and sections. But neither the correspondence nor the diagram contained any reference to a survey of the lands in question or constituted an approval of a survey. These lands still remain to be officially defined in the appropriate manner, and according to the agreed statement the survey was accepted by the Commissioner of the General Land Office, as stated, on January 31, 1906, and was filed in the local land office on November 16, 1907, entries during the interval having been suspended pending certain investigations. We think that it is immaterial that the survey was finally approved by the Commissioner without modification, for pending the approval it remained in his hands, officially incomplete, awaiting the result of his examination."

As the filing of a map of the survey in the local land office is one of the acts required to be performed in the administration of the laws of the United States relating to the survey of public lands, it follows that until the filing is made the survey may be rejected and a new survey ordered. When, however, the map has been filed and the legal title of the railway company has attached to lands embraced within the survey, the jurisdiction of the land department as to such land ceases. The filing of the map of the survey must, therefore, be the act which changes the character of the land from that of public land to that of private property.

We, therefore, submit that the lands described in the complaint did not become subject to state taxation until the plats of the surveys had been filed in the local land office, and, as the plats of the surveys of the land, described in the third cause of action, were not filed until after the first day of March, 1916, the lands were not taxable for as we have already shown, it is only property in existence and property which has a taxable status at twelve o'clock noon on the first Monday in March of any year that may be taxed for that year.

Sections 2510 and 2511 of the Revised Codes of Montana of 1907. Clearwater Timber Co. vs. Shoshone County, 155 Fed. 613.

In conclusion, we respectfully submit that the judgment of the lower court is correct and should be affirmed as to the first and second causes of action, and that the judgment on the third cause of action is erroneous and should be reversed, and judgment ordered for the railway company.

GUNN & RASCH,

Attorneys for Northern Pacific Railway Company

# United States Gircuit Gourt of Appeals

For the Ninth Circuit.

J. R. THOMPSON as County Treasurer of Flathead County, Montana,

Plaintiff in Error,

VS.

NORTHERN PACIFIC RAILWAY COMPANY,
Defendant in Error,

and

NORTHERN PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

VS.

J. R. THOMPSON as County Treasurer of Flathead County, Montana,

Defendant in Error.

#### Brief of I. **B.** Thompson, Etc.

S. C. FORD,
T. H. MACDONALD,
C. H. FOOT,
Attorneys for J. R. THOMPSON, Etc.

FER 15 WIL



# United States Gircuit Court of Appeals

For the Ninth Circuit.

J. R. THOMPSON as County Treasurer of Flathead County, Montana,

Plaintiff in Error.

VS.

NORTHERN PACIFIC RAILWAY COMPANY, Defendant in Error.

and

NORTHERN PACIFIC RAILWAY COMPANY. Plaintiff in Error.

VS.

J. R. THOMPSON, as County Treasurer of Flathead County, Montana, Defendant in Error.

#### STATEMENT OF FACTS

The statement of facts as set forth in the brief of the Northern Pacific Railway Company is satisfactory to J. R. Thompson as plaintiff in error and as defendant in error.

#### SPECIFICATIONS OF ERROR.

- 1. The District Court erred in deciding that the lands described in the first cause of action were not subject to taxation in the year of 1914.
- 2. The District Court erred in sustaining the Motion of the Northern Pacific Railway Company for judgment on the pleadings as to the first cause of action.
- 3. The District Court erred in deciding that the lands described in the second cause of action were not subject to taxation in the year of 1915.
- 4. The District Court erred in sustaining a Motion of the Northern Pacific Railway Company for judgment on the pleadings as to the second cause of action.

#### **ARGUMENT**

The argument in this case naturally divides itself into two main parts.

First, as to the Northern Pacific Railway Company's Specifications of error which are "that the District Court erred in deciding that the lands described in the third cause of action were subject to taxation for the year 1916."

The third cause of action differs from the first and second in this, that the survey of the lands described therein had been approved by the Commissioner of the General Land Office before the first Monday in March, 1916, as of which date they were assessed,

although the plat of survey had not, on that date, been filed in the local land office. It was held in the case of United States v. Morrison, 240 U. S. 192 36 S. Ct. Rep. 326 as follows:—

"By order of April 17, 1879, the Commissioner required that surveyors general should not 'file the duplicate plats in the local land offices until the duplicates have been examined in this office and approved,' and theSurveyors General 'officially notified to that effect." Re. F. A. Hyde & Co., 37 Land Dec. 165. It cannot be doubted that this requirement was within the authority of the Commissioner (see Tubbs v. Wilhoit, 138 U. S. 134, 144, 34 L. ed. 887, 890, 891, 11 Sup. Ct. Rep. 279); and it necessarily follows that the making of the old survey and its approval by the Surveyor general of Oregon did not make the survey complete as an official act. It still remained subject to the examination and approval of the Commissioner."

The approval by the Commissioner of general land office would seem to officially complete the survey.

The case of Wells v. McHenry 74, Northwestern 241, decided squarely, the case at bar, we quote:—

"It is urged that some of the lands within the place limits were not surveyed until after the taxes for the year 1892 had been levied, and that, therefore, such taxes are illegal so far as they affect such lands. The basis of the claim is the fact that while the survey in the field antedated the assessing and levying of the taxes, yet the plat of the survey was not filed in the local land office until after such levy had been made—They insist that these decisions establish the rule that a survey is not complete until after the plat is filed in the proper office. As we regard the mat-

ter, these cases have no bearing on the point now under discussion. It is undisputed that the survey as made in the field was the survey which was in fact approved, and that the plat which was subsequently filed was in fact the plat of such survey. The lands being within the place limits, the grant, as soon as it attached on the filing of the plat (assuming that it did not attach before), related back to the date of the act containing the grant to the Northern Pacific Railroad Company. The grant as to place lands is a grant in praesenti, and when it attaches it becomes a grant of the land from the very day the act took effect. See Jackson v. La Moure Co., 1 N. D. 238, 46 N. W. 449, and cases cited. It therefore appears in this case that the company was the owner of the land when it was assessed and when the tax was levied. Such land having been at that time surveyed in the field, the assessor could value it, for its boundaries were then established just as they now exist and ever since have existed."

Second, we take up the question of the first and second causes of action of the complaint. As to these two causes of action, J. R. Thompson is the plaintiff in error. These two causes of action differ from the "third" in this, that the "Survey in the Field," only, was complete. The approval of the surveyor general had not been made on the first Monday in March in either of the years, 1914 or 1915 except that township 21 N. Range 15 W. and township 21 N. of Range 17 W., had on the first Monday of March 1915, been previously approved by the Surveyor General of the United States for Montana. Except as to the two

townships last mentioned, we as plaintiffs in error rely solely upon the fact that the actual survey in the field had been completed before the dates as of which the lands in question had been assessed.

Section 1 of the Act of Congress of July 10,

1886, provided as follows:—

"No lands granted to any railroad corporation by any act of congress shall be exempt from taxation by States, Territories, and municipal corporations on account of the lien of the United States upon the same for the costs of surveying, selecting, and conveying the same, or because no patent has been issued therefor, but this provision shall not apply to lands unsurveyed: Provided, that any such land sold for taxes shall be taken by the purchaser subject to the lien for costs of surveying, selecting, and conveying, to be paid in such manner by the purchaser as the Secretary of the Interior may by rule provide and to all liens of the United States, all mortgages of the United States, and all rights of the United States in respect of such lands; provided, further, that this act shall apply only to lands situated opposite to and coterminus with completed portions of said roads, and in organized counties; provided further, that at any sale of lands under the provisions of this act the United States may become a preferred purchaser, and in such case the lands sold shall be restored to the public domain and disposed of as provided by the laws relating thereto, (24 Stat. 143),"

Lands conveyed to the Northern Pacific Railway Company are taxable then when they cease to be Unsurveyed lands within the meaning of the act.

So far as the act is concerned we are not required to discuss the question as to when land is **surveyed** or

completely surveyed nor the plat of a survey, the approval of a survey or the filing of the plat of a survey except as such discussion is incidental to the discussion of the intention of Congress when it used the term unsurveyed.

"In the interpretation of statutes words are to be construed in their natural plain and ordinary significance. It is a very well settled rule that so long as the language used is not ambiguous no departure from its natural meaning is justified, etc." (36 Cyc. 1114. See also 23 Am. and Eng. Ency. Law page 298.

#### Meaning of term Surveyed:

"To determine the form, extent, position, etc. of, as a tract of land, coast, harbor, or the like by means of linear and angular measurements and the application of the principles of geometry and trigonometry; as, to survey lands or coasts." (Webster's International Dictionary, 1894 comprising issues 1864, 1879-84).

In Muse v. Arlington 68 Fed. 641, the court says:—

"The actual survey consisted of 'running lines with compass and chain, establishing corners, marking tree and other objects on the ground, giving bearings and distances, and making field notes and plats of the works. These are the ingredients of an actual survey.' Quoting Winter v. U. S. Hempst. 362, Fed. Cas. No. 17, 895."

If we give to the statute its natural and ordinary meaning, Northern Pacific lands granted under the act of 1864 are taxable when the survey in the field has been made and on such construction the Treasurer of Flathead County is entitled to judgment on

the first and second causes of action as well as on the third.

There are exceptions to the last discussed rule which might properly be considered here:

#### TECHNICAL TERMS

"Terms of art, or technical words and phrases used in a statute, and such others as may have acquired a peculiar and appropriate meaning in the law must be interpretated in accordance with their received meaning and acceptation with the learned in the art, trade, or profession to which they belong, unless it clearly appears from the context or otherwise, that it was the intention of the legislature to use them in a different sense." (36 Cyc. 1118.)

Had the term surveyed, then, in 1886 acquired in law or even in the land department any extraoardinary meaning?

An examination of land office orders will show that even the ordinary meaning that we contend for, was of such force, that qualifying words must be carefully inserted, before the meaning contended for by the Northern Pacific Railway Co., in their Brief would be at all apparent. They used the terms "approved plat of the survey," "there must be posted forthwith a notice specifying the township that has been surveyed," "plat of the survey will be filed," etc. (See Brief of Northern Pacific Railway Co., page 9 quoting from general land office, circular of January 25, 1904) "Survey was accepted (by a Commissioner of general land office) for payment only," "Survey in

the field," "officially complete survey" (The foregoing expressions are taken from the Morrison case Supra which was decided in February, 1916). The term survey had not at that time acquired any peculiar significance in law it would seem. Much less had it acquired any such significance in 1886.

The proper construction of the act in question, if indeed construction is required to determine its meaning, must be made in the light of conditions existing at the time of the act of July 2, 1864. The Northern Pacific Railroad Co., had been granted certain lands of which the lands taxed in this case were a part.

"The words in that Act 'that there be and hereby is granted' are words of absolute donation and import a grant in praesenti." (Leavenworth R. R. C. v. U. S. 92 United States, 741, 23 L. Ed. 637)

There was, however, enacted in 1870 the following:

"That before any land granted to said Company by the United States shall be conveyed to any party entitled thereto under any of the Acts incorporating or relating to said Company, there shall first be paid into the Treasury of the United States the cost of surveying, selecting, and conveying the same by the Company or party in interest." (16 Stat. at L., p. 305.)

It was decided by the United States Supreme Court that by virtue of such act,

"The government was, as to these costs, in the condition of a trustee in a conveyance to secure payment of money. But, if the land was liable to be sold for taxes due to state, territorial or county organizations, this security would be easily

lost." Northern Pacific R. R. Co., v. Rockery 115

U. S. 600, Bk. 29, p. 480.

:

"We are aware of the use being made of this principle by the companies, who, having earned the lands, neglect to pay these costs in order to prevent taxation The remedy lies with Congress and is of easy application. If that body will take steps to enforce its lien for these costs of survey, by sale of the lands or by forfeiture of title, the Treasury of the United States would soon be reimbursed for its expenses in making the surveys, and the States and Territories, in which the lands lie, be remitted to their appropriate rights of taxation. The courts can do no more than declare the law as it exists." (Northern Pacific R. R. Co., v. Rockney 115 U. S. 600 Bk. 29, p. 480.)

In the July following the foregoing opinion which was handed down December 7, 1885, Congress passed the act under discussion.

There was inserted in the Act the words "but this provision shall not apply to lands unsurveyed." Those words, it would seem, added nothing except to emphasize the fact that Congress was not abrogating the common law rules that "before lands are taxable they must be capable of definite description."

We quote from State v. Central Railway Co. (Supreme Court of Nevada) 25 Pac. 443. In commenting on the act of July 10, 1886, they say:—

"A reason for witholding the right to tax unsurveyed lands may be found in the fact that it is impracticable to assess them. It is a well established principle of law that land assessed for the purpose of taxation must be so described that it may be identified. The purposes of this require-

ment, as stated by Judge Cooley, are—'First, that the owner may have information of the claim made upon him or his property; second, that the public, in case the tax is not paid, may be notified what land is to be offered for sale for the non-payment; and, third, that the purchaser may be enabled to obtain a sufficient conveyance.' (Cooley, Tax'n 284.)"

"The exemption enforces the principle that lands may not be assessed for taxation unless de-

scribed so that they may be found."

And in Wells v. McHenry (supra):-

"It therefore appears in this case that the company was the owner of the land when it was assessed and when the tax was levied. Such land having at that time been surveyed in the field, the assessor could value it, for its boundaries were then established just as they now exist.-------The lands being within the place limits, the grant, as soon as it attached on the filing of the plat (assuming that it did not attach before) related back to the date of the act containing the grant to the Northern Pacific Railroad Company. The grant as to place lands is a grant in praesenti, and when it attaches it becomes a grant of the land from the very day the act took effect." (See Jackson v. La Moure Co. 1 N. D. 238, 46 N. W. 449.)

The doctrine of relation meets no such objection in the case at bar as in the Morrison case (supra) for the reason that this is a case of a grant in praesenti, and that, the case of a grant taking effect on the completion of the survey.

IN CONCLUSION WE RESPECTFULLY submit that as to the third cause of action the survey was officially complete before the lands were assessed. Congress intended to use the term survey in its ordinary meaning and intended to re-assert the common law doctrine, that, to be taxable, lands must be capable of definite description. On the approval of the plat by the commissioner of the general land office the lands received a taxable status by the doctrine of relation back as of the date they were surveyed in the field and at which time the assessor could determine their location.

That the judgment of the District Court should be affirmed as to the third cause of action and overruled as to the first and second and that the County Treasurer should have judgment on all causes of action.

S. C. FORD,
T. H. MacDONALD,
C. H. FOOT,

Attorneys for J. R. Thompson, as County Treasurer, etc.



#### United States

# Circuit Court of Appeals

For the Ninth Circuit.

NORTHERN PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

VS.

J. R. THOMPSON, as County Treasurer of Flathead County, Montana,

Defendant in Error,

and

J. R. THOMPSON, as County Treasurer of Flathead County, Montana,

Plaintiff in Error,

VS.

NORTHERN PACIFIC RAILWAY COMPANY,
Defendant in Error.

#### REPLY BRIEF OF NORTHERN PACIFIC RAILWAY CO.

Gunn & Rasch, Attorneys for Northern Pacific Railway Company.

FVB 211 1910



#### United States

# Circuit Court of Appeals

For the Ninth Circuit.

NORTHERN PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

VS.

J. R. THOMPSON, as County Treasurer of Flathead County, Montana,

Defendant in Error,

and

J. R. THOMPSON, as County Treasurer of Flathead County, Montana,

Plaintiff in Error,

VS.

NORTHERN PACIFIC RAILWAY COMPANY,
Defendant in Error.

Reply Brief of Northern Pacific Railway Company.

In the brief for the County Treasurer the case of Wells vs. McHenry, 74 N. W. 241, is cited in support of the proposition that the lands in question were taxable after the survey in the field. The Court in the opinion in that case says: "But it is insisted that this land was not taxable because the survey fees had not been paid. In this connection counsel for the receivers cite the Rockne Case, 115 U. S. 600.

The Act of Congress which modified the rule laid down in that case was qualified by the proviso that it should not apply to unsurveyed land. If these lands were at the time they were assessed unsurveyed within the meaning of the statute, it is clear that they could not be taxed." The Court held that the lands were surveyed and subject to taxation as soon as surveyed in the field. The case does not appear to have been cited or recognized as an authority.

As railroad lands are treated and regarded as public lands for all purposes, except sale, until they are identified by a survey, it must follow that the right of the United States to the possession, use and enjoyment of such lands continues until the lands cease to be public lands and become private property. If our contention is correct, that until a survey becomes a completed administrative act by the filing of the plat in the local land office, the approval by the Commissioner of the General Land Office may be withdrawn and the survey abandoned, then the right of the United States to the possession of railroad lands must continue until the plat is filed, and to permit the lands to be taxed before that time might result in depriving the United States of the possession, use and enjoyment of unsurveyed railroad lands.

The case of Wells vs. McHenry completely overlooks the right of possession of the United States to railroad lands until they are surveyed. This is probably due to the fact that the decisions defining the status of unsurveyed railroad lands and holding that the United States may recover for timber taken therefrom and prevent the inclosing of such lands were rendered after the decision in Wells vs. Mc-Henry.

To hold that railroad lands may be taxed before the right of possession of the United States ceases would require the payment of taxes by the railroad company upon lands of which it is not entitled to possession and of which it can make no use or derive any benefit. This would be contrary to the fundamental principles of the law of taxation.

In the case of Northern Pacific R. R. Co. vs. Rockne, 115 U. S. 600, which involved the right to tax Northern Pacific lands before the cost of surveying had been paid, the Court said:

"It follows that if the assessment of these taxes is valid and the proceedings well conducted, the sale confers a title paramount to all others, and thereby destroys the lien of the United States for the cost of surveying these lands. If, on the other hand, the sale could not confer such a title, it is because there exists no authority to make it."

The same reason which impelled the Court to hold Northern Pacific lands could not be taxed until the cost of surveying was paid argues conclusively that such lands cannot be taxed while they are regarded as public lands and the United States is entitled to the possession, use and enjoyment of same.

In the Morrison case, it was contended that the survey when approved "related back to the date of the grant or at least to the date of the survey in the field." The Court said:

"And if Congress had this power of disposition, it must mean that the lands could be disposed of under the authority of Congress at any time before the survey became a completed administrative act. The doctrine of relation cannot be invoked to destroy this authority."

For the same reason that the doctrine of relation cannot defeat the right of disposal by the United States as held in the Morrison case, the doctrine of relation cannot take away from the United States the right which it has to the possession, use and enjoyment of railroad lands until the survey thereof has become a completed administrative act.

Respectfully submitted,
GUNN & RASCH,
Attorneys for Northern Pacific Railway Co.

#### United States

## Circuit Court of Appeals

For the Ninth Circuit.

EDWARD H. PHELAN.

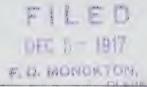
Plaintiff in Error.

VS.

THE UNITED STATES OF AMERICA. Defendant in Error

### Transcript of Record.

Upon Writ of Error to the United States District Court, for the Southern District of California, Southern Division.





# United States Circuit Court of Appeals

For the Ninth Circuit.

EDWARD H. PHELAN.

Plaintiff in Error,

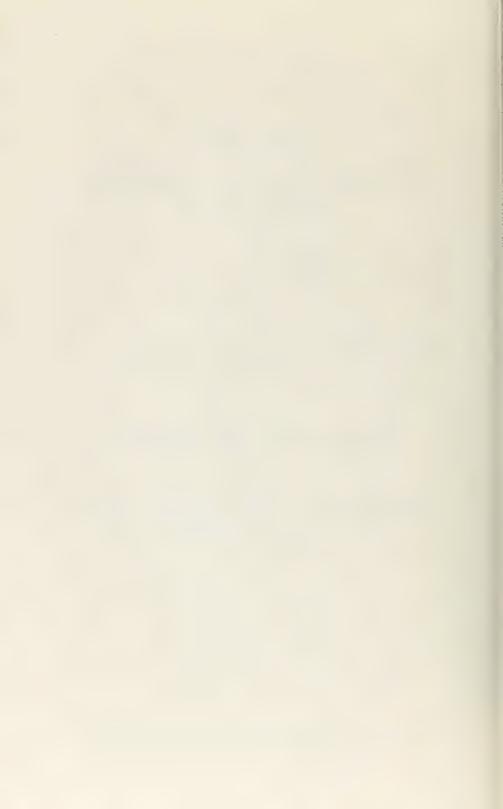
VS.

THE UNITED STATES OF AMERICA,

Defendant in Error.

# Transcript of Record.

Upon Writ of Error to the United States District Court, for the Southern District of California, Southern Division.



#### INDEX.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original record are printed literally in italic; and, likewise, cancelled matter appearing in the original record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

PAGE
Affidavit of R. T. Walters148
Arraignment and Plea of Defendant 9
Assignment of Errors157
Bill of Exceptions
Citation of Writ of Error 2
Clerk's Certificate to Judgment Roll 30
Clerk's Certificate to Transcript of Record195
EXHIBITS:
U. S. Exhibit 1 (Application for Membership to
Knights of Columbus)
U. S. Exhibit 2 (Petition to Set Aside Home-
stead) 88
U. S. Exhibit 3 (Application for Pension) 98
U. S. Exhibit 4 (Photostatic Copy of Applica-
tions)103
U. S. Exhibit 5 (Telegram)
U. S. Exhibit 6 (Letter from A. B. Bielaski to
John R. O'Connor, Asst. U. S. Atty.)118
Indictment 5

PAGE
Instructions Given
Instructions Requested by Defendant and Refused. 128
Judgment of the Court
Motion for a New Trial146
Names and Addresses of Attorneys I
Opening Statement on Behalf of Plaintiff 32
Order Allowing Writ of Error and Admitting De-
fendant to Bail187
Order Denying Motion for New Trial150
Order Settling Bill of Exceptions153
Petition for Writ of Error154
Praecipe for Transcript of Record189
Record of Trial Stating Each Day's Proceedings . 13
Supersedeas Bond191
Testimony on Behalf of Government:
Dale, Miss Rexie 44
Daven, Mrs. Susie
Cross-Examination 49
Daven, Frank
Cross-Examination
Harnett, Father Patrick 35
Isbell, Mrs. Mary 40
Cross-Examination 43
Jeffries, George T
Price, William L
Rechsteiner, Haribet J 44
Taylor, Claya115
Testimony on Behalf of Defendant:
Collins, H. E122
Gooch, T. L122

PA	AGE
Gregg, A. H	124
Martinez, Mrs. Maria Jesus de	120
Cross-Examination	121
Phelan, Edward Henry	76
Cross-Examination	81
Redirect Examination	83
Phelan, Mrs. Mary	84
Cross-Examination	86
Recalled	95
Recalled	119
Prince, George F	125
Schwed, Max	123
Cross-Examination	123
Sorenson, C	125
Souden, O. M	126
Strong, Mrs. Harriett W. R	124
Verdict	
Writ of Error	3



# Names and Addresses of Attorneys.

For Plaintiff in Error:

ISIDORE B. DOCKWEILER, Esq., 1035 I. N. Van Nuys Building, Los Angeles, California.

For Defendant in Error:

ROBERT O'CONNOR, Esq., United States Attorney; CLYDE R. MOODY, Assistant United States Attorney, Fourth Floor Federal Building, Los Angeles, California. In the District Court of the United States, for the Southern District of California, Southern Division.

Citation of Writ of Error.

United States of America—ss.

To the United States of America, and to the United States District Attorney for the Southern District of California, Southern Division. Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals, to be held at the city of San Francisco in the state of California, on the 30th day of November, A. D. 1917, pursuant to a writ of error, filed in the clerk's office of the United States District Court of the Southern District of California, Southern Division, in that certain action No. 1299 Criminal, wherein Edward H. Phelan is plaintiff in error, and you are the defendant in error, to show cause, if any there be, why the judgment and sentence given, made and rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and speedy justice should not be done to the plaintiff.

Witness the Honorable Benjamin F. Bledsoe, United States district judge for the Southern District of California, Southern Division, this 2nd day of November, 1917, and of the independence of the United States, the one hundred and forty-first.

BENJAMIN F. BLEDSOE, United States District Judge. Receipt of a copy of the within citation is hereby admitted this 2nd day of November, 1917.

# ROBERT O'CONNOR,

United States District Attorney for the Southern District of Cal.

# By GORDON LAWSON,

Assistant District Attorney.

[Endorsed]: Original. No. 1299 Criminal. Dept. .... In the District Court for the Southern District of California, Southern Division. United States of America, plaintiff, vs. Edward H. Phelan, defendant. Citation on Writ of Error. Filed Nov. 2, 1917. Wm. N. Van Dyke, clerk, by Chas. N. Williams, deputy clerk. Isidore B. Dockweiler, suit 502 Douglas Bldg., office Tel., Main 1320 (Sunset), Home 1320, Los Angeles, Cal., attorney for defendant. Removed to 1035 I. N. Van Nuys Bldg.

United States Circuit Court of Appeals, Ninth Circuit.

# Writ of Error From United States Circuit Court of Appeals to United States District Court.

United States of America—ss.

The President of the United States of America, to the Honorable, the Judges of the United States District Court in and for the Southern District of California, Southern Division, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you or some of you, between the United States of America, as plaintiff, and Edward H. Phelan, as defendant, a manifest error hath happened, to the great damage of the said Edward H. Phelan, defendant, as by his complaint appears.

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do hereby command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco in the state of California, on the 30th day of November, A. D. 1917, next, in the said United States Circuit Court of Appeals to be there and then held, that the record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, chief justice of the United States, this 2nd day of November, A. D. 1917, and of the independence of the United States the one hundred and forty-first.

(Seal) WM. M. VAN DYKE,

Clerk of the United States District Court in and for the Southern District of California, Southern Division.

> By Chas. N. Williams, Deputy Clerk.

The above writ of error is hereby allowed.

BLEDSOE, District Judge. I hereby certify that a copy of the within Writ of Error was on the 2nd day of November, 1917, lodged in the clerk's office of the said United States for the Southern District of California, Southern Division, for the said defendant in error.

(Seal) WM. M. VAN DYKE,

Clerk of the United States District Court, Southern District of California, Southern Division.

By Chas. N. Williams,

Deputy Clerk.

Service of the within Writ of Error is hereby admitted, this 2nd day of November, A. D. 1917.

ROBERT O'CONNOR,

United States District Attorney. By GORDON LAWSON.

Assistant District Attorney.

[Endorsed]: Original. No. 1299 Criminal, Dept. ..... In the United States Circuit Court of Appeals, Ninth Circuit. United States of America, plaintiff, vs. Edward H. Phelan, defendant. Writ of Error from United States Circuit Court of Appeals to United States District Court. Filed Nov. 2, 1917. Wm. M. Van Dyke, clerk; by Chas. N. Williams, deputy clerk. Isidore B. Dockweiler, suite 502 Douglas Bldg., office Tel., main 1320 (Sunset), Home 1320, Los Angeles, Cal., attorney for defendant. Removed to 1035 I. N. Van Nuys Bldg.

In the District Court of the United States in and for the Southern District of California, Southern Division.

At a stated term of said court, begun and holden at

the city of Los Angeles, county of Los Angeles, within the Southern Division of the Southern District of California, on the second Monday of July, in the year of our Lord one thousand nine hundred and seventeen.

The Grand Jurors of the United States of America, chosen, selected and sworn, within and for the division and district aforesaid, on their oaths present:

That Edward H. Phelan, on June 5, 1917, at Whittier, in said division and district, was a male person between the ages of twenty-one and thirty, to-wit, a male person who then had attained his twenty-first birthday and who did not on that day attain and had not before then attained his thirty-first birthday, and as such person was then and there required, by the proclamation of the President of the United States dated May 18, 1917, to present himself for and submit to registration, under the Act of Congress approved May 18, 1917, and entitled "an act to authorize the President to increase temporarily the military establishment of the United States," at the registration place in Los Nietos precinct, Los Angeles county, in said division and district, between 7 a. m. and 9 p. m. on said June 5, 1917, that precinct then being the precinct wherein said Edward H. Phelan then had his permanent home and actual place of legal residence, from which he was not then temporarily absent; and that said Edward H. Phelan, so then and there being such person, unlawfully did wilfully fail and refuse so then and there to present himself for registration and to submit thereto as in said act provided and in said proclamation appointed; he, the

said Edward H. Phelan, then and there not being an officer or an enlisted man of the Regular Army, of the Navy, of the Marine Corps, or of the National Guard or Naval Militia in the service of the United States, or an officer in the Reserve Corps or an enlisted man in the Enlisted Reserve Corps in active service;

Against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

ALBERT SCHOONOVER,
United States Attorney.
GORDON LAWSON,
Assistant United States Attorney.

[Endorsed]: No. 1299 Crim. United States District Court, Southern District of California, Southern Division. The United States of America vs. Edward H. Phelan. Indictment Viol. Sec. 5, Act of May 18, 1917. Failure to register. A true bill, Martin C. Marsh, foreman. Filed Sep. 7, 1917. Wm. M. Van Dyke, clerk; T. F. Green, deputy. Bail \$5000.00. Albert Schoonover, U. S. Atty.

At a stated term, to-wit, the July term, A. D. 1917, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the court room thereof, in the city of Los Angeles, on Saturday, the eighth day of September, in the year of our Lord one thousand nine hundred and seventeen:

#### Present:

The Honorable Benjamin F. Bledsoe, district judge.

# No. 1299 Crim. S. D. THE UNITED STATES OF AMERICA,

Plaintiffs,

VS.

### EDWARD H. PHELAN,

Defendant.

This cause coming on this day by consent for the arraignment of defendant and for the entry of his plea; Gordon Lawson, Esq., assistant U. S. attorney, appearing as counsel for the United States; defendant being present on bail, with his counsel, Isidore Dockweiler, Esq.; and defendant having been called and arraigned, having stated that his true name is Edward H. Phelan, having waived the reading of the indictment, and, on being required to plead to said indictment, defendant having pleaded not guilty as charged therein, which plea is now, by order of the court, entered herein, defendant being by the court granted leave to withdraw said plea on September 17th, 1917, if he shall be so advised; whereupon it is ordered that this cause be, and the same hereby is, continued until Monday, the 17th day of September, 1917, at 10 o'clock a. m., for the setting of the same down for trial before the court and a jury to be impanelled.

At a stated term, to-wit: the July term, A. D. 1917, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the court room thereof, in the city of Los Angeles, on Wednesday, the seventeenth day of October, in

the year of our Lord one thousand nine hundred and seventeen:

#### Present:

The Honorable Oscar A. Trippet, district judge.
No. 1200 Crim., 3 D. (T)

THE UNITED STATES OF AMERICA.

Plaintiffs,

VS.

#### EDWARD H. PHELAN,

Defendant.

This cause coming on this day to be tried before the court and a jury to be impanelled; Wm. F. Palmer, Esq., and Gordon Lawson, Esq., appearing as counsel for the United States; defendant being present on bail, with his counsel, Isidore B. Dockweiler, Esq.; A. S. Custer and W. J. Clark being present as shorthand reporters of the testimony and proceedings, and acting as such; and both sides having answered ready; and the court having ordered that the trial proceed, and that a jury be impanelled herein; and the following twelve (12) petit jurors having been duly drawn, called and sworn on voir dire, to-wit: J. A. Bothwell, F. U. Hickok, Otis E. Tiffany, Geo. W. Andes, H. S. Harvey (who is affirmed instead of sworn), Wm. H. Mayo, John L. Slaughter, Geo. Fraser, E. B. Norman, J. A. Weldt, Geo. W. Maxon and Chas. T. Fenner, and said jurors having been examined by the court and by counsel for the Government and by counsel for defendant; and H. S. Harvey having been challenged for cause by the Government, which challenge is resisted by defendant and denied by the court; and J. A. Weldt having been challenged for cause by the Government,

which challenge is resisted by defendant and sustained by the court and the juror excused; and Lewis C. Torrance, a petit juror, having been duly drawn, called, swore on voir dire, examined by the court and by counsel for the Government and by counsel for defendant, and passed for cause; and the jurors now in the box having been passed for cause, and H. S. Harvey having been challenged peremptorily by the Government and excused; and J. A. Bothwell and Lewis C. Torrance having been challenged peremptorily by defendant and excused; and the remaining nine jurors having been accepted by counsel for the Government and by counsel for defendant and duly sworn as jurors to try this cause; and, in place of the three jurors excused on peremptory challenges, H. A. Bankson, Michael Duffey and Wing H. Fillmore, petit jurors, having been duly drawn, called, sworn on voir dire, examined by the court and by counsel for the Government and by counsel for defendant and passed for cause; and Wing H. Fillmore having been challenged peremptorily by defendant and excused; and C. W. Fisher, a petit juror, having been duly drawn, called, sworn on voir dire, examined by the court and by counsel for the Government and by counsel for defendant and passed for cause; and jurors Bankson, Duffey and Fisher having been accepted by counsel for the Government and by counsel for defendant and duly sworn as jurors to try this cause; and the impanellment of the jury being completed, said jury as so impanelled and sworn consisting of the following named jurors, to-wit:

#### JURY.

1. Michael Duffey

2. F. U. Hickok

3. Otis E. Tiffany

4. Geo. W. Andes

5. H. A. Bankson

6. Wm. H. Mayo

7. John L. Slaughter

8. Geo. Fraser

o. E. B. Norman

10. C. W. Fisher

11. Geo. W. Maxon

12. Chas. T. Fenner

and the court having admonished the jurors that, during the progress of this trial, they are not to permit other persons to speak to them, nor themselves speak to other persons, about this case, or anything connected with this case, and that, until said case is given them under the instructions of the court, they are not to speak to each other about this case, or anything therewith connected; and thereupon, at the hour of 11:23 o'clock a. m., court having taken a recess for o minutes: and now, at the hour of 11:32 o'clock a. m., court having reconvened; and defendant, counsel and shorthand reporters being present as before; and all of the jurors being present in court; and the clerk having read the indictment to the jury and announced to the jury defendant's plea of not guilty, and Gordon Lawson, Esq., assistant U. S. attorney, having made a statement to the jury as to what the Government expects to prove; and George G. Jeffers having been called and sworn as a witness on behalf of the United States, and having given his testimony; and the court having given the jury the usual admonition; it is, at the hour of 12 o'clock m., ordered that this cause be, and the same hereby is continued for further trial

until the hour of 2 o'clock p. m., of this day, until which time the jurors are excused.

\* \* \* \* \* \* \* \* \*

No. 1299 Crim., S. D. (T)
THE UNITED STATES OF AMERICA,
Plaintiffs.

VS.

#### EDWARD H. PHELAN,

Defendant.

This cause coming on at this time to be further tried before the court and a jury heretofore duly impanelled herein; Wm. F. Palmer, Esq., and Gordon Lawson, Esq., assistant U. S. attorneys, appearing as counsel for the United States; defendant being present on bail, with his counsel, Isidore B. Dockweiler, Esq.; A. S. Custer and W. J. Clark being present as shorthand reporters of the testimony and proceedings, and acting as such, and all of the jurors being present in court; and the question of admissibility of certain evidence having been argued, on behalf of the Government, by Wm. F. Palmer, Esq., and Gordon Lawson, Esq., assistant U. S. attorneys, of counsel for the United States, upon which question the court does not at this time rule; and Wm. L. Price, Father Patrick Harnett, Mrs. Mary Isabelle and Rexie Dale having respectively been called and sworn as witnesses on behalf of the United States, and having given their testimony; and the court having given the jury the usual admonition; and thereupon, at the hour of 3:36 o'clock p. m., court having taken a recess for 8 minutes; and now, at the hour of 4:44 o'clock p. m., court having reconvened: and defendant, counsel and shorthand reporter being

present as before; and all of the jurors being present in court: and Haribert I. Rechsteiner having been called and sworn as a witness on behalf of the United States and having testified; and, in connection with the testimony of said witness the Government having offered an exhibit, which is admitted in evidence in its behalf, to-wit: Govt. Ex. 1, application of defendant to become a member of the Knights of Columbus; and Susie Davin having been called and sworn as a witness on behalf of the United States, and having given her testimony; and the court having given the jurors the usual admonition; it is, at the hour of 4:22 o'clock p. m., ordered that this cause be, and the same hereby is continued for further trial until Thursday, the 18th day of October, 1917, at 10 o'clock a. m., until which time the jurors are excused.

At a stated term, to-wit: the July term, A. D. 1917, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the court room thereof, in the city of Los Angeles, on Thursday, the eighteenth day of October, in the year of our Lord one thousand nine hundred and seventeen:

#### Present:

The Honorable Oscar A. Trippet, district judge.
No. 1299 Crim, S. D.

THE UNITED STATES OF AMERICA,

Plaintiffs,

VS.

EDWARD H. PHELAN,

Defendant.

This cause coming on this day to be further tried before the court and a jury heretofore duly impanelled herein; Gordon Lawson, Esq., and Wm. F. Palmer, Esq., assistant U. S. attorneys, appearing as counsel for the United States; defendant being present on bail, with his counsel, Isidore B. Dockweiler, Esq.; A. S. Custer and W. J. Clark being present as shorthand reporters of the testimony and proceedings, and acting as such; and the roll of the jury having been called, and all being present; and Susie Davin, a witness on behalf of the United States, having again taken the stand for further examination, and having given her testimony; and the Government having rested; and Edward H. Phelan, the defendant, having been called and sworn as a witness in his own behalf, and having given his testimony; and the court having given the jury the usual admonition; and thereupon, at the hour of 11:17 o'clock a. m., court having taken a recess for 10 minutes; and now, at the hour of 11:27 o'clock a. m., court having reconvened; and defendant, counsel and shorthand reporters being present as before; and Mary Phelan, having been called and sworn as a witness on behalf of defendant, and having given her testimony; and, in connection with the testimony of said witness, the Government having offered an exhibit, which is admitted in evidence in its behalf, to-wit: Govt. Ex. 2, petition for homestead in Probate Court; and the court having given the jury the usual admonition; thereupon, at the hour of 11:58 o'clock a. m., it is ordered that this cause be and the same hereby is continued for further trial until the hour

of 2 o'clock p. m. of this day, until which time the jurors are excused.

\* \* \* \* \* \* \* \*

No. 1299 Crim. S. D.
THE UNITED STATES OF AMERICA.

Plaintiffs,

VS.

EDWARD H. PHELAN,

Defendant.

This cause coming on at this time to be further tried before the court and a jury heretofore duly impanelled herein; Gordon Lawson, Esq., and Wm. F. Palmer, Esq., assistant U.S. attorneys, appearing as counsel for the United States; defendant being present on bail, with his counsel, Isidore B. Dockweiler, Esq.; A. S. Custer and W. I. Clark being present as shorthand reporters of the testimony and proceedings, and acting as such; and all of the jurors being present in court; and Mary Phelan, a witness on behalf of the defendant, having again taken the stand for further examination. and having given her testimony; and, in connection with the testimony of said witness, the Government having offered two exhibits, which are admitted in evidence in its behalf, to-wit: U. S. Ex. 3, photostat copy of deposition of Mary Phelan; and U. S. Ex. 4. photostat copy of declaration of Mary Phelan for pension; and the court having given the jury the usual admonition and thereupon, at the hour of 3:00 o'clock p. m., court having taken a recess for 6 minutes; and now, at the hour of 3:15 o'clock p. m., court having reconvened; and defendant, counsel and shorthand reporters being present as before; and all of the jurors

being present in court; and Claya Taylor having been called and sworn as a witness on behalf of the United States, and having given her testimony; and, in connection with the testimony of said witness, the Government having offered two exhibits which are admitted in evidence in its behalf, to-wit: U. S. Ex. 5, telegram, O'Connor, U. S. Atty. to Atty. General; and U. S. Ex. 6, letter of Oct. 10, 1917, Bureau of Investigation to O'Connor; and Mary Phelan, a witness on behalf of defendant, having been recalled by the Government for further examination, and having given her testimony; and Maria Jesus de Martinez having been called and sworn as a witness on behalf of defendant. and having given her testimony, through R. J. Dominguez, court interpreter of the Spanish and English languages; and H. E. Collins, T. L. Gooch, Max Schwed, Mrs. Harriet W. Strong, A. H. Gregg, Geo. F. Prince, C. Sorenson and O. M. Souden having respectively been called and sworn as witnesses on behalf of defendant, and having given their testimony; and defendant having rested; and this cause having been argued to the jury, on behalf of the Government, by Wm. F. Palmer, Esq., assistant U. S. attorney, of counsel for the United States; and the court having given the jury the usual admonition; thereupon, at the hour of 4:29 o'clock p. m., it is ordered that this cause be, and the same hereby is continued for further trial until Friday, the 19th day of October, 1917, at 10 o'clock a. m., until which time the jurors are excused.

At a stated term, to-wit: the July term, A. D. 1917, of the District Court of the United States of

America, in and for the Southern District of California, Southern Division, held at the court room thereof, in the city of Los Angeles, on Friday, the nineteenth day of October, in the year of our Lord one thousand nine hundred and seventeen:

#### Present:

The Honorable Oscar A. Trippet, district judge. No. 1299 Crim. S. D.

THE UNITED STATES OF AMERICA,

Plaintiffs,

VS.

### EDWARD H. PHELAN,

Defendant.

This cause coming on this day to be further tried before the court and a jury heretofore duly impanelled herein; Gordon Lawson, Esq., and Wm. F. Palmer, Esq., appearing as counsel for the United States: defendant being present on bail, with his counsel, Isidore B. Dockweiler, Esq.; A. S. Custer being present as shorthand reporter of the testimony and proceedings, and acting as such; and the roll of the jury having been called, and all being present; and this cause having been further argued to the jury, on behalf of the defendant, by Isidore B. Dockweiler, Esq., of counsel for defendant; and the court having given the jury the usual admonition; and thereupon, at the hour of 11:15 o'clock a. m., court having taken recess for 5 minutes; and now at the hour of 11:20 o'clock a. m., court having reconvened; and defendant, counsel and shorthand reporter being present as before; and this cause having been further argued to the jury, on behalf of the Government, in reply, by Gordon Lawson, Esq., assistant U. S. attorney, of counsel for the United States; and the court having read to the jury its written instructions; it is, on motion of defendant by his counsel, ordered that the instructions requested by defendant at the former trial of this cause be, and they hereby are deemed to have been, requested by the defendant at this trial of said cause; now, on motion of defendant and by direction of the court, it is ordered that exceptions be, and they hereby noted to the refusal of the court to give the instructions requested by defendant, and also to certain of the instructions given by the court; and Josiah W. Bell having been duly sworn to take charge of the jury; it is ordered that the U.S. marshal for this district take said jurors to some suitable place for their dinner, said dinner, for the jurors and accompanying officers, to be at the expense of the United States, and that thereafter said U.S. marshal return the jurors to their room to consider of their verdict; and thereupon, at the hour of 12:35 o'clock p. m., the jury having retired, in charge of said sworn officer, to consider of their verdict; and now, at the hour of 2:48 o'clock p. m., the jury having come into court; defendant and counsel being present as before; I. Benjamin, one of the official shorthand reporters of this court, being present and acting as such; and all of the jurors being present in court in charge of said sworn officer; and the jurors having been asked if they have agreed upon a verdict, and having, through their foreman, replied that they have so agreed and having been required to present their

verdict; and said verdict having been read by the clerk and the jurors having said that it is their verdict; now, by direction of the court, said verdict is filed and recorded by the clerk, said verdict as so recorded being as follows, to-wit:

"In the District Court of the United States, in and for the Southern District of California, Southern Division. The United States of America, plaintiffs, vs. Edward H. Phelan, defendant. No. 1299 Crim. We, the jury in the above entitled cause, find the defendant Edward H. Phelan guilty as charged in the indictment. Los Angeles, California, October 19th, 1917. John L. Slaughter, foreman."

Thereupon it is by the court ordered that said jurors be, and they hereby are excused until Tuesday. the 23rd day of October, 1917, at 10 o'clock a. m.; and it is further ordered that this cause be, and the same hereby is, continued until Monday, the 22nd day of October, 1917, at 2 o'clock p. m., for the sentence of defendant, said defendant in the meantime to remain at large on his present bail bond.

#### Instructions Given.

The offense, gentlemen with which this defendant is charged, is that of wilfully failing and refusing to submit himself for registration under the act providing for the temporary increase of the military forces of the United States Government, in that the said Edward Phelan, on June 5, 1917, within this district, being a male person between the ages of twenty-one and thirty-one, to-wit, who had attained his twenty-first

birthday, but who had not, on that day and had not before then attained his thirty-first birthday, and as such person was then and there required by the proclamation of the President of the United States to present and submit himself for registration within the hours provided by law, did then and there unlawfully and wilfully fail and refuse to present himself for registration, and to submit to registration as in such act and in said proclamation provided, he then and there not being an officer or enlisted man of the regular army, and not being in anywise engaged in military service.

This indictment on file, and which I have just read, is, and is to be considered as, of course, a mere charge or accusation against the defendant, and is not, of itself, any evidence of the defendant's guilt, and no juror in this case should permit himself to be, to any extent, influenced against the defendant because or on account of such indictment on file. It is the duty of the jury to decide whether the defendant is guilty or not guilty of the offense charged after a consideration of all of the evidence submitted in the case. It is not for you to consider the penalty prescribed for the punishment of an offense at all. If you are aware of the penalty prescribed by law, it is your duty to disregard that knowledge; in other words, your sole duty, gentlemen, is to decide whether the defendant is guilty or not guilty of what he is charged with. The question of punishment is left wholly to the court, except as the law circumscribes its power.

You are instructed, gentlemen, that you are the exclusive judges of the credibility of the witnesses

whose testimony has been admitted in evidence herein, and of the effect and value of such evidence. Your power in this regard, however, is not arbitrary, but is to be exercised with legal discretion and in subordination to the rules of evidence.

It is the province of the court under the law to state to you the rules of law applicable to the case, and you, in your deliberations, will be guided by those rules so stated.

It is your duty, unaided by the court, to pass upon and decide all questions of fact.

Every witness is presumed to speak the truth, but this presumption may be repelled by the manner in which he or she testifies, by his or her appearance upon the stand, by the character of his or her testimony, or by the giving of false or perjured testimony by him or her, or by evidence affecting his or her character for truth, honesty or integrity, or by his or her motives, interest or bias, or by contradictory evidence.

A witness may be impeached by the party against whom he or she was called; by contradictory evidence, by evidence that he or she has made, at other times, statements inconsistent with his or her present testimony, and by evidence that his or her general reputation for truth, honesty and integrity is bad.

If you believe that any witness has been impeached, or that the presumption of truthfulness attaching to the testimony of such witness has been repelled, then you are to give the testimony of such witness such credibility, if any, as you may think it entitled to. You are not bound to decide in conformity with the declarations of any number of witnesses which do not

produce conviction in your minds against a less number or against a presumption or other evidence satisfying your minds.

The law permits the defendant, at his own request, to testify in his own behalf. The defendant here has availed himself of this privilege and his testimony is to be treated like the testimony of any other witness,—that is, it is for you to say, remembering his testimony, his cross-examination, his demeanor and attitude on the witness stand, and during the trial, and everything else in the case, whether or not he told the truth. The deep personal interest which he may have in the result of the suit should be considered by the jury in weighing his evidence and in determining how far, or to what extent, if at all, it is worthy of credit.

If any witnesses are shown knowingly to have testified falsely on this trial, touching material matters here involved, the jury are at liberty to reject the whole or any part of their testimony.

In civil cases, gentlemen, the affirmative of the issue must be proved, and when that is contradicted, the decision must be in accordance with the preponderance of the evidence; but, in criminal cases, guilt must be established beyond a reasonable doubt, and the burden of establishing such guilt rests upon the Government. The law does not require of a defendant that he prove himself innocent, but the law requires the Government to prove the defendant guilty in the manner and form as charged in the indictment, beyond reasonable doubt, and unless the Government has done so, the jury should acquit.

Before a verdict of guilty can be rendered, each

member of the jury must be able to say, in answer to his own individual conscience, that he, in his mind, has arrived at a fixed opinion, based upon the law and the evidence in the case, and upon nothing else, that the defendant here is guilty.

There are two classes of evidence recognized and admitted in courts of justice, upon either of which juries may lawfully find an accused guilty of crime; one is direct or positive testimony of an eve-witness to the commission of the crime; the other is testimony in proof of a chain of circumstances pointing sufficiently strong to the commission of the crime by the defendant, and which is known as circumstantial evidence. Such evidence may consist of admissions by the defendant plans laid for the commission of the crime, in short, any acts, declarations or circumstances admitted in evidence tending to connect the defendant with the commission of the crime. Where the evidence is entirely circumstantial, yet is not only consistent with the guilt of the defendant, but inconsistent with any other rational conclusion, the law makes it the duty of the jury to convict.

The good character of a person accused of crime, when proven as a fact in the case, is a circumstance tending, in a greater or less degree, to establish his innocence. It must be considered in connection with all the other facts and circumstances of the case, and may be sufficient in itself to raise a reasonable doubt as to the defendant's guilt; but if, after a full consideration of the evidence adduced, the jury believes the defendant to be guilty of the crime charged, they

should so find, notwithstanding proof of good character.

The law presumes a defendant charged with crime innocent until proven guilty, beyond a reasonable doubt. If you can reconcile the evidence before you upon any reasonable hypothesis consistent with the defendant's innocence, you are to do so, and, in that case, find the defendant not guilty.

You are further instructed that you cannot find the defendant guilty unless, from all the evidence, you believe him guilty, beyond a reasonable doubt.

A reasonable doubt is a doubt based on reason and which is reasonable in view of all the evidence, and if, after an impartial comparison and consideration of all the evidence, or from want of sufficient evidence on behalf of the Government to convince you of the truth of the charge, you can candidly say you are not satisfied of the defendant's guilt, then you have a reasonable doubt, but if, after such impartial comparison and consideration of all the evidence you can truthfully say you have an abiding conviction of the defendant's guilt such as you would be willing to act upon in the more weighty and important matters relating to your own affairs, then you have no reasonable doubt. By such reasonable doubt you are not to understand that all doubt is to be excluded, for it is impossible in the determination of these questions to be absolutely certain. You are required to decide the question submitted to you upon the strong probabilities of the case, and in order to justify a conviction the probabilities must be so strong as not to exclude all doubt or

possibility of error, but as to exclude reasonable

When, weighing all the evidence, you have an abiding conviction and believe that the defendant is guilty, it is your duty to convict. No sympathy justifies you in seeking for doubt by any strained or unreasonable construction or interpretation of evidence or facts. The law of the United States, as declared by the Congress thereof, gentlemen, among other things, in the Act of Congress approved March 18, 1917, provided for the tempoary increase of the military forces of the United States occasioned because of the war with Germany,—

"That all male persons between the ages of twentyone and thirty, both inclusive, shall be subject to registration in accordance with regulations to be prescribed by the President, and upon a proclamation by the President or other public notice given by him or by his direction stating the time and place of such registration, it shall be the duty of all persons of the designated ages, except officers and enlisted men of the Regular Army, the Navy, and the National Guard and Naval Militia, within the boundaries of the United States, to present themselves for and submit to registration under the provisions of this act, and every such person shall be deemed to have notice of the requirements of this act upon the publication of said proclamation or other notice, as aforesaid, given by the President or by his direction, and any person who shall wilfully fail or refuse to present himself for registration or to submit thereto, as herein provided, shall be guilty of a misdemeanor."

The question in this case, gentlemen, is, primarily, what was the age of the defendant Phelan on Registration Day, June 5, 1917? If, on that day, he had attained his thirty-first birthday, then he was not liable to that draft, and not required to present himself for registration, and should be acquitted by you. If, however, you find and believe that the defendant Phelan was not thirty-one years of age on said Registration Day, that is, if he was born subsequently to June 5, 1886, and in good faith believed that he was born subsequently to that day, and you believe that he wilfully refused to register, then you should convict him. It might be that though he was, in truth and in fact, under thirty-one, yet he, in good faith and with sufficient reason, believed himself to be over thirty-one years of age, in such event I charge you he could not be held wilfully to have neglected to register. The element of wilfulness, in addition to the mere question of age as above referred to, must be present in order to justify a conviction.

The word wilful implies an intent and purpose on the part of a person to do or not to do an act.

In this case the defendant admits that he knew that persons over twenty-one years of age—who had not attained their thirty-first birthdays,—were required to register, for he says that he took a person to the registration place for the purpose of registration. Now, if the defendant had not, in fact, reached his thirty-first birthday, and if, in fact, he knew or believed that he had not reached his thirty-first birthday, being over twenty-one years of age, the element of wilfulness would be established.

This case, gentlemen, like all cases triable in a court of justice, should be determined by you upon the evidence before you, and upon that alone, subject to the rules of law laid down for your guidance by the court, and no juror acting conscientiously, can base his verdict upon any other consideration.

In this connection, you are instructed that juries are empaneled for the purpose of agreeing upon a verdict, if they can conscientiously do so. It is true that each juror must decide the matter for himself, yet he should do so only after a consideration of the case with his fellow jurors. He should not hesitate to sacrifice his views or opinions of the case when convinced that they are erroneous, even if in so doing he defer to the views or opinions of others.

[Endorsed]: No. 1299 Crim. U. S. District Court, Southern District of California, Southern Division. United States of America vs. Edward Phelan. Instructions Given. Filed Oct. 19, 1917. Wm. M. Van Dyke, clerk; by Geo. W. Fenimore, deputy clerk.

In the District Court of the United States, in and for the Southern District of California, Southern Division.

No. 1299 Crim.
THE UNITED STATES OF AMERICA.

Plaintiffs,

VS.

EDWARD H. PHELAN,

Defendant.

#### Verdict.

We, the jury in the above-entitled cause, find the defendant Edward H. Phelan,—guilty as charged in the indictment.

Los Angeles, California, October 19th, 1917.

JOHN L. SLAUGHTER,

Foreman.

[Endorsed]: No. 1299 Crim. U. S. District Court, Southern District of California, Southern Division. United States of America vs. Edward H. Phelan. Verdict. Filed Oct. 19, 1917. Wm. M. Van Dyke, clerk; by Geo. W. Fenimore, deputy clerk.

At a stated term, to-wit: the July Term, A. D. 1917, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the court room thereof, in the city of Los Angeles, on Monday, the 22nd day of October, in the year of our Lord one thousand nine hundred and seventeen.

Present: The Honorable Oscar A. Trippet, District Judge.

THE UNITED STATES OF AMERICA,

Plaintiff,

VS.

EDWARD H. PHELAN,

Defendant.

No. 1299 Criminal, S. D.

This cause coming on this day for the sentence of defendant, Gordon Lawson, Esq., and Wm. F. Palmer, Esq., Assistant U. S. attorneys, appearing as counsel for the United States; defendant being present on bail,

with his counsel, Isidore B. Dockweiler, Esq.; and said counsel for defendant having moved the court for a continuance of this cause for sentence, and said motion for continuance having been argued, in support thereof, by Isidore B. Dockweiler, Esq., of counsel for defendant, and in opposition thereto by Wm. F. Palmer, Esq., assistant U. S. attorney, of counsel for the United States: It is by the court ordered that defendant's said motion for a continuance of this case be, and the same hereby is denied; and defendant's motion for a new trial, and an affidavit in support thereof, having been filed in open court; and said motion for a new trial having been argued, in support thereof, by Isidore B. Dockweiler, Esq., of counsel for defendant, and in opposition thereto by Gordon Lawson, Esq., and Wm. F. Palmer, Esq., assistant U. S. attorneys, of counsel for the United States, and in support thereof in reply by Isidore B. Dockweiler, Esq., of counsel for defendant. It is ordered that the defendant's said motion for a new trial herein be, and the same hereby is denied, to which ruling of the court, on motion of defendant and by direction of the court, exceptions are hereby entered on behalf of said defendant; and, on motion of Isidore B. Dockweiler, Esq., of counsel for defendant, it is ordered that said defendant be, and he hereby is granted ten (10) days within which to prepare, serve and file his proposed bill of exceptions herein; whereupon the court pronounces sentence upon said defendant for the offense of which he now stands convicted. namely, the offense of failure to register in violation of the Act of Congress of May 18th, 1917, and the proclamation of the President of the same date, as

follows, to-wit: The judgment of the court is, that the defendant, Edward H. Phelan, be imprisoned for the term of twelve (12) months in the county jail of Los Angeles county, California, and that he thereupon be registered according to the provisions of said Act of Congress; whereupon, on motion of Isidore B. Dockweiler, Esq., of counsel for defendant, it is ordered that defendant be, and hereby is, granted ten (10) days stay of execution of judgment herein, defendant in the meantime to remain at large on his present bail bond.

In the District Court of the United States, in and for the Southern District of California, Southern Division.

No. 1299 Crim. S. D. THE UNITED STATES OF AMERICA,

Plaintiffs,

VS.

#### EDWARD H. PHELAN,

Defendant.

I, Wm. M. Van Dyke, clerk of the District Court of the United States for the Southern District of California, do hereby certify the foregoing to be a full, true and correct copy of an original judgment entered in the above-entitled cause; and I do further certify that the papers hereto annexed constitute the judgment roll in said cause.

Attest my hand and the seal of said District Court, this 24th day of October, A. D. 1917.

(Seal) WM. M. VAN DYKE,

Clerk.

By Geo. W. Fenimore, Deputy Clerk. [Endorsed]: No. 1299 Crim. In the District Court of the United States for the Southern District of California, Southern Division. The United States of America vs. Edward H. Phelan. Judgment Roll. Filed Oct. 24th, 1917. Wm. M. Van Dyke, clerk; by Geo. W. Fenimore, deputy clerk. Recorded Min. book No. 28, page.....

In the District Court of the United States, for the Southern District of California, Southern Division.
HON. OSCAR A. TRIPPET, Judge Presiding.
No. 1299 Criminal.

UNITED STATES OF AMERICA,

Plaintiff.

VS.

EDWARD H. PHELAN,

Defendant.

# Bill of Exceptions on Behalf of Defendant, Edward H. Phelan.

Be it remembered that heretofore the Grand Jury of the United States of America, in and for the Southern District of California, Southern Division, did find and return in the above entitled court its indictment against Edward H. Phelan, the above named defendant, and thereafter said defendant appeared in said court, and having duly pleaded as shown by the record therein, and the case being at issue, the same came on regularly for trial on Wednesday, the 17th day of October, 1917, before the said District Court, Hon. Oscar A. Trippet, judge presiding, the plaintiff, United States of America, being represented by Messrs. W.

Fleet Palmer and Gordon Lawson, assistants to the United States District Attorney, and the defendant, Edward H. Phelan, by Isidore B. Dockweiler, Esq. A jury having been duly empaneled and sworn, the court admonished the jury as follows:

Gentlemen of the Jury: I am about to permit you to separate, and during the separation you will not converse among yourselves or permit anybody else to address you on any subject connected with the trial. Do not form or express an opinion about the case until it is finally submitted to you. The purpose of this admonition is that the jury, and each juror, should receive all impressions concerning the case while acting as a juror; you should not have any impressions or receive any impressions from any sources whatever, unless you are acting as a juror in the case. And the jurors not summoned on this panel will be excused until the 23rd at 10 o'clock. We will take a recess, gentlemen, of five minutes."

Whereupon a recess of five minutes was taken. At the expiration of the five minutes recess, the jury being present in court, upon instructions from the court, the clerk read to the jury the indictment upon which the defendant was to be tried.

Thereupon the following proceedings were had:

# Opening Statement on Behalf of Plaintiff.

By Mr. Lawson:

Your Honor, and gentlemen of the jury: The Government expects that the evidence in this case will show that the defendant was born July 13, 1886; that would bring him within the requirements of the select-

ive service act; and that on June 5th, 1917, the defendant should have registered the same as the rest of the men who were required by that act to register.

We expect that the evidence will show that in 1886, before July 13, that those people who were in a position to know, acted upon the belief,—and they had good grounds for believing—that the defendant was not in existence. And we expect that the evidence in this case will show that the defendant knew that he was born July 13, 1886, and that through all the course of his life he acted on that belief.

We expect that the evidence will show that his mother, and that his father, and that his brothers and sisters, and his friends who knew him, all believed and acted upon the belief that he was born July 13th, 1886, and that in all the various experiences of this defendant's life, wherever the question of his age came up, it was always July 13, 1886, until June 5, 1917, and then for the first time were his friends aware, or did he ever announce to anybody that he was born March 13, 1886.

And the Government expects to show that this defendant deliberately planned and contrived by holding himself out at this time as having been born on March 13, 1886, to avoid the services as required by the selective service act.

And, gentlemen of the jury, the United States, the ten million young men who registered on June 5th, will expect you to find this gentleman guilty and require of him the same service as the rest of the men who were required to register on June 5th.

The Court: Do you desire to make your opening statement now, Mr. Dockweiler?

Mr. Dockweiler: No, Your Honor.

The Court: Call your witness.

# Testimony of George T. Jeffries, for the Government.

George T. Jeffries, a witness called on behalf of the Government, having been first duly sworn, testified as follows:

### Direct Examination

By Mr. Lawson:

My name is George T. Jeffries, and my occupation is deputy county recorder of Los Angeles county, and as such I have custody of the files and records of that office. I have with me a book containing the declarations of homestead for the year 1886. I have recorded there a declaration of homestead executed and signed by one Thomas Phelan June 4th, 1886.

Thereupon it was stipulated that Thomas Phelan was the father of the defendant, and that he is dead. Whereupon, after discussion between the court and counsel as to the admissibility of certain evidence, the court, after duly admonishing the jury, took a recess until two o'clock p. m. At two o'clock p. m. of said day, Wednesday, October 17th, 1917, the court reconvened, and the jury being present, the proceedings of the trial were resumed.

After considerable discussion between court and counsel as to the admissibility of certain evidence the witness was excused.

## Testimony of William L. Price, for the Government.

William L. Price, a witness called on behalf of the Government, having been first duly sworn, testified as follows:

#### Direct Examination

By Mr. Lawson:

My name is William L. Price. I am a deputy county clerk in the probate department, Los Angeles county, and as such have custody of the files and records of that office. I have in my custody now the will of Thomas Phelan, which I obtained from the files and records in the county offices. I obtained the same from the files of Case No. 10936, Superior Court of the state of California, probate department, in the matter of the estate of Thomas Phelan, deceased. The same was filed January 9th, 1890.

Whereupon, after discussion between the court and counsel as to the admissibility of certain evidence, the witness was excused.

## Testimony of Father Patrick Harnett, for the Government.

Father Patrick Harnett, a witness called on behalf of the Government, having been first duly sworn, testified as follows:

### Direct Examination

By Mr. Lawson:

I am a priest of the Roman Catholic church, and as such have custody of the baptismal records. The priest who officiates at a baptism is supposed to record it.

Q. What are the facts that the priest is required to record?

A. He is obliged to record the date of the baptism, the name of the child baptized, the names of the parents of the child—

Mr. Dockweiler: Just one minute. Now, one minute, Monsignor, please. Now, I believe that the prosecution is going to attempt by this witness—

Mr. Palmer: We object, Your Honor, to the gentleman drawing any conclusions here.

The Court: Make your objection, Mr. Dockweiler.

Mr. Dockweiler: I was preliminarily going to state, I understood from past experience that they were going to attempt to prove the date of the baptism of the defendant.

The Court: Now, when it comes to that you can make your objection.

Mr. Dockweiler: I now object-

The Court: Please sit down, Mr. Dockweiler. The statement he is making now does not contain that objection. Proceed with your statement.

Mr. Lawson: These baptisms-

The Court: Read the statement.

Mr. Dockweiler: I want to object to the question upon the ground it is incompetent, irrelevant and immaterial.

The Court: The objection will be overruled.

Mr. Dockweiler: Exception.

The Court: Read the statement.

(Last statement read by the reporter as follows: "He is obliged to record the date of the baptism, the name of the child baptized, the names of the parents of the child")

The Witness (continuing): The date of birth, the date of birth of the child, and the names of the sponsors.

Q. By Mr. Lawson: Those are the facts you are required to enter?

A. Yes.

When a baptism is performed at a church, or any church, and the priest's home is adjacent to the church, the baptism is usually recorded before it is performed. In cases where the baptism is performed at a distance from the church, then the priest makes a note of the facts in the case and transfers them from his note book either to a day book or to the baptismal register.

I have the baptismal record for the year 1886 with me, and there is recorded in that book the baptismal record of the defendant, Edward Henry Phelan. I baptized the child, and after referring to the record can state the date of the baptism.

The Court: All right. I think his testimony as to the date of baptism would be better than the record.

Mr. Dockweiler: Yes, Your Honor, if it is competent.

Q. By the Court: Now, what date was the child baptized?

Mr. Dockweiler: Now, just one minute. Now, pardon me, Your Honor, I want to get in an objection. We object to that question upon the ground that the same is incompetent, irrelevant and immaterial. As the defendant contends, it is wholly immaterial to the issues in this case as to when the defendant was baptized in the Roman Catholic church.

The Court: The objection will be overruled.

Mr. Dockweiler: Exception.

The Court: Answer the question, Father Harnett.

A. I baptized the child on the 8th of August, 1886.

Q. By the Court: Where?

Mr. Dockweiler: The same objection. The same ruling, I assume?

The Witness: I am not quite certain as to where the child was baptized, but I assume it was baptized in Los Nietos.

The Court: Anything further of this witness?

Q. By Mr. Lawson: What is the teaching, Father Harnett, in the Catholic church in regard to infants dying before baptism?

Mr. Dockweiler: We object to that as incompetent, irrelevant and immaterial.

The Court: The objection will be overruled.

Mr. Dockweiler: Exception.

The Court: Now, wait a minute. I will overrule the objection. You may answer it later. Father, did the parents of this defendant at that time belong to the Roman Catholic church?

A. Yes, sir.

Q. Do you know who attended this baptism and were sponsors for the child?

A. I knew at the time the child was baptized, but I have forgotten and don't know.

The Court: Now, you may answer the question.

Mr. Lawson: Read the question.

(Last question read by the reporter as follows: "What is the teaching, Father Harnett, in the Catholic

church in regard to infants dying before baptism"?)

Mr. Dockweiler: May I have an exception to that? The Court: Yes, sir.

Mr. Dockweiler: Thank you. Exception.

A. The teaching of the Catholic church with regard to the death, or with regard to the salvation of infants who die without baptism is that no one, no child who is unbaptized and dies before it attains the use of reason can enter into the kingdom of heaven.

Q. Was there a practice in your church that was known to those parents concerning when the children should be baptized?

Mr. Dockweiler: Now, we object to that question upon the ground that it is incompetent, irrelevant and immaterial, and upon the ground that it assumes that the Monsignor knew what was in the minds of the parents of the child.

The Court: I will overrule the objection.

Mr. Dockweiler: Exception. I guess the question better be repeated.

The Court: Read it to him.

(Last question read by the reporter.)

A. I don't know.

I don't remember the incident of the baptism at all. The parents of the child lived about 15 miles from the parish school, and so far as I know he did not attend the Los Nietos school.

## Testimony of Mrs. Mary Isbell, for the Government.

Mrs. Mary Isbell, a witness called on behalf of the Government, having been first duly sworn, testified as follows:

### Direct Examination

By Mr. Lawson:

My full name is Mary Isbell, and I live in Whittier, Los Angeles County. I know the defendant in this case and live just a little ways from him, but I don't know exactly how far. I don't know exactly how many years I have lived at Whittier, but I have been neighbors of the Phelan family ever since I have been there. I guess it has probably been forty years. I have a daughter who was born July 11th, I think, as well as I remember, but I don't remember the year that she was born.

Q. By Mr. Lawson: Mrs. Isbell, do you know whether or not Mrs. Phelan was confined at about the same time that you were confined with your daughter, Rexie Dale?

Mr. Dockweiler: One moment. We object to that question as leading and suggestive; incompetent, irrelevant and immaterial.

The Court: The objection will be overruled.

Mr. Dockweiler: Exception. Here is a lady who has got—

Mr. Lawson: Your Honor-

The Court: Never mind. Wait a minute. I have ruled on this question. Let her answer it.

Mr. Dockweiler: All right. Now, does she remember the question, Your Honor?

Mr. Lawson: Why, of course she does.

(Testimony of Mrs. Mary Isbell.)

Mr. Dockweiler: Well, I don't know.

Mr. Lawson: Your Honor, we object to this line of argument. We have a right to ask the witness—

The Court: Be seated, Mr. Lawson. Let the witness answer the question.

(Answer of the witness inaudible and the reporter requested that she repeat the answer.)

A. I said that I didn't remember.

Mr. Lawson: Mrs. Isbell, did Mrs. Phelan visit you about the time of the birth of your daughter, according to the best of your recollection?

A. I couldn't say for certain whether she did or not.

Q. According to the best of your recollection?

A. I couldn't say because I really don't remember.

Q. Do you know, Mrs. Isbell, whether or not at the time you were confined with your daughter, Rexie Dale, whether at that time or after—whether the defendant was born after that time, when you were confined with your daughter, Rexie Dale?

A. I couldn't say.

Mr. Dockweiler: We object to the question.

Mr. Lawson: Now, then, I object to the interference of counsel for defendant until we have a chance to put the question.

Mr. Dockweiler: I thought you had finished the question,

The Court: Wait a minute, Mr. Dockweiler. You will address the court.

Mr. Dockweiler: Well, yes; pardon me.

The Court: It is unnecessary,—counsel, Mr. Law-

(Testimony of Mrs. Mary Isbell.)

son has a right to make an objection, and it is perfectly proper for him to make it any time he wants to make an objection to a question you ask. This question has been asked and answered as I understand it. Read it, 'Mr. Reporter.

(Last question and answer read by the reporter as follows:)

- "Q. Do you know, Mrs. Isbell, whether or not at the time you were confined with your daughter, Rexie Dale, whether at that time or after—whether the defendant was born after that time when you were confined with your daughter, Rexie Dale."
  - "A. I couldn't say."
- Q. By Mr. Lawson: Well, according to your best recollection, Mrs. Isbell?
- A. Well, really I couldn't tell you. Of course, I don't know anything about when he was born.
- Q. But, just according to your best recollection. Do you remember whether or not at that time Mrs. Phelan was confined with the defendant at the same time when you were confined with your daughter, Rexie Dale?

Mr. Dockweiler: We object to that question upon the ground that the question has already been put and answered.

The Court: The answer was stricken out. I will overrule it.

Mr. Dockweiler: Well, no, the second one was not. The Court: Answer the question.

Q. By Mr. Lawson: According to your best recollection?

(Testimony of Mrs. Mary Isbell.)

- A. Well, I declare I couldn't say, because I don't know.
- Q. Well, what is your memory of that occurrence? Mr. Dockweiler: We object to that upon the ground—

The Court: Wait a minute. Finish your objection. Mr. Dockweiler: We object to that upon the ground that the same is incompetent, irrelevant and immaterial, and it has already been testified to by the witness that she did not know.

The Court: The objection will be overruled. Read the question to the witness.

Mr. Dockweiler: Exception.

- A. Well, I thought mine was the oldest. Of course, I couldn't say positively.
- Q. By Mr. Lawson: You thought that your daughter was older?
- A. Was the oldest, yes. I don't know anything about how much, or anything about it, and I may be wrong in that. That is to my best recollection.

### Cross-Examination

### By Mr. Dockweiler:

I am seventy years old and have had eight children. I don't remember the year in which Rexie was born and I can't remember the year in which any of my children were born. Owing to my age, I certainly have a very poor memory. It is difficult for me to remember with any degree of certainty anything that occurred years ago.

## Testimony of Miss Rexie Dale, for the Government.

Miss Rexie Dale, a witness called on behalf of the Government, having been first duly sworn, testified as follows:

### Direct Examination

By Mr. Lawson:

My full name is Miss Rexie Dale; that is my professional name. Mrs. Isbell, who just testified, is my mother. I don't know the age of the defendant, Edward Henry Phelan.

Q. And when were you born, Miss Dale?

Mr. Dockweiler: We object to that as irrelevant and immaterial.

The Court: Objection overruled.

Mr. Dockweiler: Exception.

A. I was born July 11, 1886.

Q. By Mr. Lawson: July 11, 1886?

A. Yes.

Whereupon a discussion took place between court and counsel as to the admissibility of certain documentary evidence, at the end of which discussion the court, after duly repeating the admonition to the jury, took a short recess. After a few minutes the court reconvened, and the jury being all present, the proceedings of the trial were resumed.

# Testimony of Haribet J. Rechsteiner, for the Government.

Haribet J. Rechsteiner, a witness called on behalf of the Government, having been first duly sworn, testified as follows:

# (Testimony of Haribet J. Rechsteiner.) Direct Examination

By Mr. Lawson:

My full name is Haribet J. Rechsteiner, and I am financial secretary of Los Angeles Council Number 621, Knights of Columbus. As such secretary I have received the application for the defendant for membership in the Knights of Columbus, also the authority to represent the supreme secretary. I have not the original application of the defendant for membership in the Knights of Columbus. That was filed with the court records at the last trial. I received it from the supreme secretary, submitted it to the District Attorney, and he filed them. That is the application which I received.

Mr. Lawson: Your Honor, I offer this application of the defendant as evidence.

Mr. Dockweiler: We object to it, Your Honor, upon the ground that it is incompetent, irrelevant and immaterial, no sufficient foundation having been shown therefor.

The Court: I do not know as I understand this.

Mr. Palmer: It is the application of the defendant for admission as a member of the order of the Knights of Honor.

Mr. Lawson: The Knights of Columbus, and he there states or sets out his birthday and signs the application. The signature is attached thereto.

The Court: The objection will be overruled.

Mr. Dockweiler: I note an exception.

Mr. Lawson: We submit this as Government Exhibit Number 1.

(Testimony of Haribet J. Rechsteiner.)

(The document so offered and identified was thereupon marked "U. S. Exhibit Number 1.")

Mr. Lawson: (Reading the document to the jury:)

"I, Edward Henry Phelan—" this is an application for associate membership in the order of the Knights of Columbus. (Reading:)

"I, Edward Henry Phelan, of number Whittier Street.—" With your permission I will read the pertinent part of this application, and then submit it to the reporter to copy. Will that be all right, Mr. Dockweiler?

Mr. Dockweiler: I stand by my objection.

Mr. Lawson: (Reading.) "— of Whittier, or town of Whittier, county of Los Angeles, state of California,"—

The Court: (Interposing) Mr. Lawson, I think probably you ought to prove the signature on that document, inasmuch as they object to the competency of it, that is, the signature of the defendant to the document. Simply because the paper bears his name does not prove its authenticity.

Witness: I attended the first trial and heard a part of the defendant's testimony. I heard his testimony in regard to the signing of the application, I heard the middle of it.

- Q. Do you remember whether or not he stated at that time he signed this application?
  - A. Yes.
  - Q. He admitted signing it, did he?
  - A. He admitted signing it; yes, sir.

(Testimony of Haribet J. Rechsteiner.)

Mr. Dockweiler: As I understand, the witness answered the question, "did ye," yes.

The Court: That doesn't make any difference.

Mr. Dockweiler: I move to strike out the answer with a view to enabling me to note an objection.

The Court: You can move to have it stricken out on the ground that you object to the question.

Mr. Dockweiler: I object to the question upon the ground that the same is incompetent, irrelevant and immaterial.

The Court: The objection will be overruled. The motion is denied.

Mr. Dockweiler: I note an exception.

The Court: Proceed, Mr. Lawson.

Mr. Palmer: I think the record shows that was stricken out?

The Court: No, it was not; at least I did not so rule; I told him to make a motion to strike out.

Mr. Lawson: We will begin all over again. The application for associate membership in the order of the Knights of Columbus reads: (Reading) (United States Exhibit No. 1, Application of Edward Henry Phelan for Membership in Los Angeles Council, Knights of Columbus, dated June 14th, 1909.) "I, Edward Henry Phelan, of Whittier, city of Whittier, county of Los Angeles, state of California, hereby apply for associate membership in the order of the Knights of Columbus through Los Angeles Council Number 621, and do declare and say that I was born in Whittier on the 13th day of July, 1886, and am 23 years of age, as computed from my nearest birthday;

(Testimony of Haribet J. Rechsteiner.)

that I am a practical Roman Catholic, and dutifully attend the Whittier church of the above city or town."

The rest of it is by-laws, etc., of the organization. (Reading.) "Signed by me, Edward H. Phelan, this day of June, the 14th, 1909. Witness: Reverend W. G. Gorrell, C. M., Los Angeles Council

## Testimony of Mrs. Susie Daven, for the Government.

Mrs. Susie Daven, a witness called on behalf of the Government, having been first duly sworn, testified as follows:

### Direct Examination

By Mr. Lawson:

number 621."

My name is Mrs. Susie Daven, and I live near Pico Station near Whittier. We get our mail from Rivera. I have lived in Los Angeles county ever since I was ten years old. I know the defendant in this action. My husband was working for Mrs. Phelan, and we lived there then. That was in the month of October, 1914, on the 16th of October. We lived there from that time until the 4th of January, 1916. We moved from Mrs. Phelan's ranch January 4th, 1916. We went back to the Phelan ranch on the 17th day of July, 1916, and moved from there on the 14th day of May of this year, 1917. I left before my husband.

Q. While you were on the ranch, at that time, just before you left this year, did you or did you not hear the defendant make any statement as to whether or not he would register?

Mr. Dockweiler: We object to that upon the ground

(Testimony of Mrs. Susie Daven.) that the same is incompetent, irrelevant and immaterial.

The Court: The objection is overruled. Mr. Dockweiler: I note an exception.

The Court: Read the question,

(The reporter thereupon read the pending question as previously recorded.)

Mr. Dockweiler: We do not deny that we did not register, Your Honor.

The Witness: He said he would not register because he was not going to be killed for any other nation, and he would disguise himself and go out into the mountains either of Arizona or Nevada.

Mr. Lawson: You may cross examine.

By Mr. Dockweiler:

I live in Dubois' place, near Pico Station, with my husband and the children. I have been married with my husband nine years. We were married in Los Angeles. I was at my home. The judge married us on Fickett street. He came to the house and married us. I don't remember the number of the house, but it is on Fickett street near First street. I was living there at the time, and my husband was living there.

I first became acquainted with the defendant, Edward Phelan, in October, 1914. Prior to that time I did not know either the defendant or his mother, or any other member of his family. I got acquainted with him the day we moved there, October 15th. When we moved there, there was with me my husband and my three children. One of my children is fifteen years of age,

one thirteen, and one seven. I did not do any work on the ranch. My husband was employed by Mrs. Phelan on October 15th, 1914, to labor on the ranch. He used to cultivate and plow the ranch, and he remained there from October 15th, 1914, to January 14th, 1916. Then we left the ranch and came to Los Angeles. We went back July 17th, 1916, and our children went with us on that occasion, and we remained on the ranch from July 17th, 1916, to May 14th, 1917. On that date I went to live at Montebello. My husband did not leave on that date; he left about two or three weeks after that.

I remember living on the ranch on May 14th, 1917, and am positive as to that date because I know I moved from there the 14th day of May and went to Montebello. We occupied the old place of Mrs. Phelan's, the old ranch. Edward was living on the old ranch for about six months while we were there, but not the last time, it was the first time. We left the ranch January 4th, 1916, and lived in Los Angeles from that time until July 17th, 1916, when we left. At that time we were living on the old ranch, but at that time Mrs. Phelan and Edward were not living on the old ranch. They had moved from there to the other place, where they are now living. They call that the Judson place. The defendant lives with his mother. He is a single man. During all the time I have known him he has lived with his mother. He does a little of everything on the ranch, works there just like everybody else.

I think Mrs. Phelan, and her son, the defendant in this case, and her son, Dan, moved from the old

ranch to the Judson place about the 15th or 16th of April, 1915. I guess they are now livinig on the Judson place. We lived in Los Angeles from January 4th, 1916, to July 17th, 1916, when we moved back to the old ranch, not the Judson ranch, and we remained on the old ranch from July 17th, 1916, to May 14th, 1917. The old ranch is located I guess in what they call Whittier, or Los Nietos; I don't know what they call that street. The Judson place I should judge is about four or five blocks from the old ranch. The Lambert's and Isbell's ranches intervene between them.

When I left on May 14th, 1917, I went to Montebello, which I guess is about three or four miles from Whittier. After leaving for Montebello I did not return to the Whittier ranch, and my husband went to work for Mr. Meek. After leaving the ranch, on May 14th, 1917, I did not see the defendant, Edward Phelan, again.

- Q. Then, as I understand you, you yourself, with the children, left the Phelan ranch on May 14th, 1917?
  - A. Yes, sir.
  - Q. Is that correct?
  - A. Yes, sir.
  - Q. And you went to Montebello?
  - A. Yes, sir.
- Q. When with reference to May 14th, 1917, did you see Edward Phelan?
- A. It must have been about the first Sunday of the month when he was in the old place there with us. That is where he made the remark.
  - O. That would be the first Sunday in May?

0 .

(Testimony of Mrs. Susie Daven.)

A. Yes, sir.

Q. May, 1917?

Mr. Dockweiler: Is there a calendar here?

By Mr. Dockweiler: Q. (After having referred to calendar.) That would be May 6th. If the first—

The Court: (Interposing) The first Sunday is the 6th of May.

By Mr. Dockweiler: O. If the first Sunday in May is as shown by the calendar to have been May 6th, then the last day you talked to Edward Phelan or heard Edward Phelan talk to you was May 6th?

- A. It must have been, because I know it was the first Sunday of May.
  - Q. The first Sunday of May?
  - A. Yes, sir.
  - Q. How do you remember that?
- A. Because the second Sunday of May we were getting ready to move, and then I did not see Ed. Phelan.
- Q. Did you not see Ed. Phelan after May 6th, 1917?
  - A. I seen him in the place, but not to talk to him.
- Q. You did not talk to him and you did not hear him talk?
  - A. Yes, sir.
  - Q. Is that right?
  - A. Yes, sir.
- Q. When did this conversation occur? You are certain about these dates?
  - A. Yes, sir.
  - Q. How is it you are certain about the dates?
  - A. Because I do not forget these things.

- Q. Did you make a memorandum?
- A. No, sir; I did not, but then I can remember just the same.
- Q. Then, as a matter of fact, you have not talked to the defendant, Edward Phelan, since May 6th, 1917?
  - A. No, sir.
- Q. And you have never heard him talk since May 6th, 1917?
  - A. No, sir.
  - Q. Isn't that right?
  - A. Yes, sir.
- Q. When did you hear this conversation that you have referred to, or these statements you have referred to, as having been made by the defendant?
- A. I heard him several times, but that was the last time I heard him when he was in the kitchen with us.
- Q. When did the defendant make the statement that you refer to the first time?
  - A. The first time?
  - O. Yes.
- A. He made those remarks two or three times before, but I know on that Sunday he said he would go away and disguise himself and would not go to fight for somebody else's country.
  - Q. He would not fight for somebody else's country?
  - A. Yes, sir.
- Q. That was when he made this statement on May 6th?
- A. It must have been May 6th. I know it was the first Sunday of May.

- Q. Then on the second Sunday of May, 1917, Edward Phelan made that statement?
  - A. Yes, sir.
- Q. What was that statement? Just quote his exact words.
- A. I asked him if he was going to register, and he said "No," that he was not going to register because they were not going to take him away to fight for somebody else's country; that if they came after him he was going to disguise himself and go away to the mountains.
  - Q. Who heard him make that statement?
- A. It was my husband and my children. They were all with me.
  - Q. Where were you when that statement was made?
  - A. It was on the old place; it was the old ranch.
  - O. Where? What part of the old ranch?
  - A. It was in the kitchen of the house, I know.
  - O. What house?
  - A. Mrs. Phelan's.
  - Q. How many houses are there on that ranch?
- A. There is two places she owns, the old place and the new place.
- Q. You were not on the Judson place, the new place?
  - A. No, sir; we were on the old place.
  - Q. You refer to the house on the old place?
  - A. Yes, sir.
  - Q. And you were in the kitchen?
  - A. Yes, sir.
  - O. What time of day was this?

- A. It was in the afternoon.
- Q. What time in the afternoon?
- A. I guess it was between one and two o'clock.
- Q. Between one and two o'clock?
- A. Yes, sir.
- Q. And it was on a Sunday?
- A. Yes, sir.
- Q. What was he doing down there on Sunday?
- A. They all used to come on Sunday there.
- Q. Was Mrs. Phelan present?
- A. No, sir.
- Q. When he made that statement?
- A. No, sir; no one was present but him, the children, my husband and I.
  - Q. Who?
  - A. The children—
  - Q. (Interposing) and your husband, and yourself?
  - A. Yes, sir.
  - Q. What is your husband's name?
  - A. Frank Daven.
  - Q. Did you make a memorandum of what he said?
  - A. No, sir; I did not.
- Q. How do you recall that he said the things which you have just testified to?
  - A. Because I remember those things.
  - O. You remember them?
  - A. Yes, sir.
- Q. You have not forgotten anp part of anything he said?
  - A. No, sir.
  - O. How did you come to discuss that matter?

- A. My husband and the Phelan boys always used to talk about the war. My husband is French and they always used to side in with German people. He said the Germans were going to win the war, and tried to take the German side, because my husband is French.
- Q. It was this controversy between your husband on the one side and the Phelan boys on the other?
  - A. Yes, sir.
  - Q. Which Phelan boys?
  - A. It was Dan Phelan and Ed. Phelan.
  - Q. Dan Phelan and Ed. Phelan?
  - A. Yes, sir.
  - Q. Any other Phelan boy?
  - A. No, sir.
- Q. Did any Phelan girl talk on the subject of the war?
  - A. No, sir.
- Q. Did you hear Anna Phelan talk on the subject of the war?
  - A. No, sir.
- Q. Who has talked to you about this case? How did you come to be a witness in this case?
  - A. Because they subpoenaed me.
  - Q. Who subpoenaed you?
- A. I did not see the man who brought the subpoena, because I was here in town. My husband brought the subpoena and came with me this morning.

My husband, my girl and I came here this morning. I talked with Mr. Boden concerning what Edward Phelan had said to me on May 6th, 1917. I mean the gentleman now standing: I talked to Mr. Boden be-

cause he was over there. He asked me if we knew anything about what Edward Phelan had said as to whether he was going to register or not, and then I told Mr. Boden what I have said, the same words. I don't know who told Mr. Boden to come and see me. I knew Edna Phelan, Joseph Phelan's wife. She is not a particular friend of mine. I used to see her on the ranch with the Phelan family, but didn't know her so very well. I have not seen Edna Phelan since I left the ranch until this very day, and I have not talked to her or to Joseph Phelan since I left the ranch. I have not seen any of the Phelans since I left the ranch. I know it was May 6th that that talk occurred, and if the first Sunday of May was the 6th, then that was the date

Q. How did you come to leave the ranch?

Mr. Palmer: We object to that as incompetent.

The Court: I do not see the relevancy of it.

By Mr. Dockweiler: Q. Are you living with your husband now?

A. Yes, sir.

Q. When did you return? Isn't it a fact that you eloped with another man and were arrested?

Mr. Lawson: We object to that.

The Court: Mr. Dockweiler, I do not think that question is relevant. I request you not to follow it any further.

Mr. Dockweiler: Very well, Your Honor.

I don't remember when the conscription law was adopted by Congress or when it was enacted. My husband is in court now.

- Q. You do not want to make any correction as to any dates or anything of that sort?
  - A. No, sir.
- Q. Don't you know, as a matter of fact, that the conscription law was not enacted until May 18th, 1917?
  - A. No, I don't.

By Mr. Dockweiler: Q. You don't know?

A. No, sir.

Whereupon, at 4:30 p. m., the court, after duly admonishing the jury, adjourned court until Thursday, October 18th, 1917, at the hour of ten o'clock a. m. On Thursday, October 18th, 1917, at ten o'clock a. m., all parties being ready in the above matter, the roll of the jury was called by the clerk, and the jury all being present, Mrs. Susie Daven was recalled for further cross-examination.

### Cross-Examination

Resumed by Mr. Dockweiler:

- Q. Mrs. Daven, you are not very friendly to the defendant, are you?
  - A. Well, I don't know.

By Mr. Dockweiler: Q. Mrs. Daven, you are not very friendly to the defendant, are you?

- A. Well, I don't know.
- Q. Yes. Well, isn't it a fact that you left the ranch on May 6th, or the latter part of April—
  - A. This year?—
- Q. And in connection therewith there was some difficulty-
  - A. No, sir.
  - O. There was none?

- A. None.
- Q. Isn't it a fact that after leaving the ranch you had some difficulty?
  - A. No, sir.
- Q. By Mr. Dockweiler: Is it not a fact, Mrs. Daven, that you blame the defendant for some action taken against you by your husband immediately following your departure from the ranch?
  - A. No, sir.
  - Q. It is not a fact?
  - A. No, sir.
- Q. Well, what is your state of feeling towards the defendant?
  - A. Why, I have none.
  - Q. How?
  - A. I have none.
  - Q. You have no antagonism toward him at all?
  - A. No, sir.
  - O. How?
  - A. No, sir.
- Q. And have you attached no blame whatever to him—
  - A. No, sir.
- Q.—for anything that subsequently happened to you after leaving the ranch?
  - A. No, sir.
  - Q. Of any kind, whatsoever?
  - A. No. sir.
  - Q. That is correct?
  - A. Yes, sir.
  - I left the ranch on May 6th, or the latter part of

April, this year, but there was no difficulty in connection with my leaving, and I had no difficulty after leaving. I do not blame the defendant for some action taken against me by my husband immediately following my departure from the ranch; that is not a fact. I have no state of feeling toward the defendant and no antagonism toward him at all, and have attached no blame to him for anything that subsequently happened to me after leaving the ranch.

## Testimony of Frank Daven for the Government.

Frank Daven, a witness called on behalf of the Government, having been first duly sworn, testified as follows:

### Direct Examination

By Mr. Lawson:

My full name is Frank Daven, and I live at Pico Station, Los Angeles county. I am acquainted with Edward Phelan and have known Mrs. Phelan since October 15th, 1914. I have worked on the same ranch with Edward Phelan. I worked one place, the old place. That was in 1914, 1915 and 1916. I left the 4th day of January, 1916, and returned to the ranch July 17th, 1916. I left the last time June 7th, 1917.

While on the ranch the last time in 1917 I had a conversation with the defendant in regard to military service, the first Sunday in May, at my home on the Phelan ranch. My wife and daughter were present at that time. I can't think of anybody else.

- Q. Now, what did the defendant say at that time?
- A. Phelan say?

Mr. Dockweiler: One minute. We object to that.

Mr. Lawson: Wait a minute.

Mr. Dockweiler: We object to that question upon the ground it is incompetent, irrelevant and immaterial.

The Court: Objection overruled.

Mr. Dockweiler: Exception.

The Court: Answer the question.

A. Mr. Phelan says—he says he never got to register; he don't want to get killed going to fight for France and England—

(Balance of the witness's answer not understandable.)

The Court: Just a minute. The reporter can't understand you. Start again.

A. Mr. Phelan says he don't want to get to register because he don't want to get killed for France and England.

(Balance of witness's answer not understandable.)

Mr. Palmer: He said he let his whiskers grow and go up into the mountains and then they couldn't find him.

The Court: Mr. Palmer, don't do that any more.

Mr. Palmer: I beg Your Honor's pardon. I didn't understand it.

The Court: Don't state what the witness said any more, please. Now, wait a minute. Let us see what the reporter has. You talk too fast. Your tongue, anyhow, is hard to understand.

(Answer of the witness read by the reporter.)

The Court: Now, start in here and go slower.

A. He says he don't want to get killed for France

and England, and then go to war. He let his whiskers grow and get away up in the mountains, up in Nevada some place, and the board couldn't find him.

- Q. By the Court: What did you say about the mountains?
- A. Well, he says he go to the mountains and go some place to Nevada and the board couldn't find him; couldn't get him.

The Court: Proceed.

- Q. By Mr. Lawson: Did you have any other conversations—just a minute now—any other conversations with the defendant after that time?
- A. Well, sometimes we talk about the war every day, because I am French and Phelan take the German side, and I pay no attention after that.

### Cross-Examination

By Mr. Dockweiler:

We started to talk about the war since the draft business started in 1917. I did not have any conversation with Mr. Phelan about the war or hear him say anything about the war before the conscription law was enacted.

When I was on the ranch there was besides Mr. Phelan and myself Mr. Gunar and Mr. De La Real; those were the only men. I don't remember any other men working on the Phelan ranch since April 1st, 1917, other than those. Edward Phelan is the foreman of the ranch, the owner of the ranch. I can't explain at all who Edward Phelan worked for. I worked on the place for Edward Phelan; for Mrs. Phelan anyhow. Mrs. Phelan, his mother, kept my time. Since April

Ist, 1917, nobody else worked with me on the ranch except Edward Phelan, Mr. Gunar and Mr. De La Real. Peterson is the same man as Gunar. Peterson must be Gunar. Peterson's name is Gunar; Gunar Peterson is the full name. When I said Mr. Gunar I meant Mr. Gunar Peterson.

Since April 1st, 1917, I had a controversy with Mr. Peterson in reference to the war. Mr. Peterson, during all the time that I was working on the Phelan ranch, worked there, and Edward Phelan, as foreman, myself. Mr. Gunar Peterson and De La Real did all the work. Since the war broke out in 1914 there has been a great deal of talk on one side or the other with reference to the war. I was born in France, and naturally I am a Frenchman. I think Peterson was born in Sweden; so far as I understood he was born in Sweden. Since the war broke out I was not strong for anybody, but I am just like everybody; my sympathies were with France. Peterson, the Swede, was somewhat favorable to Germany, and between us two there was a great deal of conversation pro and con about the war.

Q. And isn't it true that most of the conversation while you were on that ranch respecting the war was between yourself and Peterson?

Mr. Palmer: We object to that, if the court please, as incompetent, irrelevant and immaterial, and not proper cross-examination. The examination—

The Court: I will hear from you on that, Mr. Dock-weiler. It don't seem to me like it is relevant.

Mr. Dockweiler: Sir?

The Court: I don't see the relevancy of it. I don't see how it has any bearing.

Mr. Dockweiler: I am going to show that these two men practically were in dispute all of the time and there was a disposition—well, to play with our friend here, and oftentimes things were said that were not seriously meant by other people on the ranch; that is, by people on the ranch who discussed matters with Mr. Daven, because of his strong advocacy long before the war occurred, and from that I intend to lead up to Ed. Phelan's connection with any conversation.

The Court: The objection will be sustained.

The conversation that I have testified to occurred in the kitchen. I cannot state the day of the week, but it was the first Sunday in May. I remember it because I was there.

Q. By Mr. Dockweiler: Now, did you talk about the war any differently from other people?

Mr. Palmer: We object to that, if the court please, as calling for—

The Court: The objection will be sustained.

Q. Was there any incident that impresses that date upon you, makes you remember that date particularly?

A. I don't put that date in my head, because I know when he talked to my wife; I remember that sure.

Q. Well, you had hundreds of talks about the war with Mr. Phelan, Mr. Peterson, and with other people?

A. Yes; but I remember that very well.

I left the Phelan ranch June 7th, 1917. I told my wife two weeks before to move. I gave her the money to move to Montebello and then I worked two weeks

and a half and then left. My wife left the ranch in May. I am not sure of the date, maybe the 20th. I know I left a couple of weeks afterwards. I don't remember the exact date my wife left; I am not sure. I don't know for sure what date she moved. I know she moved on Sunday, but I don't remember the date that my wife and children moved. My wife quit two weeks before I did. I quit the 7th of June, 1917; I am certain about that.

- Q. Well, were you in court when your wife testified?
  - A. Yes, sir.
- Q. You remember she said she left the ranch May 14th?
  - A. I don't remember the day.
- Q. Well, do you remember hearing your wife testify she left May 14th?
  - A. Well, maybe she did.

I told her to leave the ranch and go to Montebello, and she left with my approval, and I knew where she was going beforehand. It is not a fact that she left the ranch without my consent and without my knowledge.

Q. By Mr. Dockweiler: Isn't it a fact that your wife became quite unfriendly to the defendant Phelan, because of some advice Mr. Phelan gave to you, and some assistance he gave to you immediately following the departure of your wife from the ranch?

Mr. Lawson: Your Honor, objected to for the same reason, calling for a conclusion of the witness.

The Court: The objection will be sustained.

Q. By Mr. Dockweiler: Did your wife ever express to you any feeling of hostility regarding Edward Phelan because of some assistance that Edward Phelan rendered you, following the departure of your wife from the ranch?

Mr. Lawson: Object to that, Your Honor, on the grounds of hearsay and calling for a conclusion of the witness,

The Court: The objection will be sustained.

Mr. Dockweiler: Exception.

The Court: There are two or three reasons why it should be sustained. I don't suppose it is necessary for me to state them.

Q. By Mr. Dockweiler: When you left the ranch, did you have any conversation with the defandant, Edward Phelan—

A. Yes, sir,—when I left; no, sir.

Q. Wait until I finish my question.

Mr. Palmer: Wait before answering the question until there is an objection.

Q. By Mr. Dockweiler: About the time that you left the ranch, did you have any conversation with defendant Edward Phelan—

A. No, sir.

Q. —respecting your wife and her departure?

Mr. Lawson: Just a moment. Don't answer. Objected to, You Honor, calling for a conclusion of the witness, calling for a matter irrelevant, immaterial and incompetent.

Mr. Palmer: And not proper cross-examination.

The Court: I will sustain an objection to that.

Mr. Dockweiler: Exception.

When I left the ranch I was friendly with Edward Phelan and am friendly with him now. He treated me pretty good while I was on the ranch.

Q. Did he ever do anything to you to make you feel unkindly toward him?

Mr. Palmer: We object to that, if the court pleases, as incompetent, irrelevant and immaterial.

The Court: The objection will be sustained.

Mr. Dockweiler: Exception.

I have not seen Edward Phelan since I left the ranch on June 7th, 1917. When I left the ranch I did not have any controversy, quarrel, anger or difficulty at all about my pay or about anything.

The conversation that I had with Edward Phelan in May, when he stated he would not fight for France or England, took place in the morning of that day. It occurred about half-past nine, or something like that, on a Sunday morning. I don't know for sure what time it was. It was something like that; around nine and ten. It was early in the morning, between nine and ten o'clock; and it was a Sunday morning.

Q. Now, what other conversation did Edward Phelan have with you, or in your presence, in the kitchen or before he entered the kitchen that Sunday morning?

A. What was it about? I never paid any attention after that at all, because we talk every day.

Edward Phelan did not live on the ranch where I worked, but lived on the Judson place, which is about three hundred yards away. He was in the habit of visiting the old place on Sundays. He would be there

in the morning, noon and evening on Sunday and during work time. He visited the old home place on Sundays just like he did on the other days. He came that morning to see the horses, the corral, if everything was right.

I know Dan Phelan; he is Edward's brother.

Q. Well, what does Dan do around there?

Mr. Palmer: We object to that, if the court please, as incompetent, irrelevant and immaterial, and not proper cross-examination.

The Court: Well, I don't see the relevancy that has, Mr. Dockweiler.

Mr. Dockweiler: Well, I tried to get from him who his fellow workers were. He says Peterson and De La Real.

The Court: Well, you can ask him a leading question concerning Dan Phelan and whether he worked there, and so forth. I will sustain an objection.

Mr. Dockweiler: Exception.

Dan Phelan worked upon the ranch during the time that Peterson, De La Real and I worked there. I forgot to mention him. Every day that I worked for Mrs. Phelan, beginning in 1914, it is a fact that Dan Phelan worked on the ranch as a laborer as I did during the entire time. I forgot all about Dan when I mentioned the persons who worked on the ranch with me. Dan Phelan came around to the ranch every morning, Sundays and every other day. He went to the old home place on Sundays just like Ed. did.

Q. All right. Now, on this particular Sunday morning, whether it was nine o'clock or ten o'clock, or

half-past nine, what did defendant Ed Phelan say to you, if anything, as to why he went there that morning?

- A. Well, once in awhile he go home and talk to me.
- Q. How?
- A. Once in a while he go to my house and we talk a little bit.
  - Q. And what would you talk about?
  - A. Talk about the work, or something.
  - O. About the work?
  - A. Yes, sir.
- Q. All right. Now, how did the conversation occur in which you say Ed. Phelan made these statements, that he would not fight for France or for England?
  - A. That conversation come up—
  - Q. How did it happen?
- A. That conversation come out because my uncle's wife has got two Frenchmen rents his ranch, and the French consul comes out and says, "Boys, you have to get ready to go to war. We are going to want you any time." Ed. Phelan says, "I am no fool to go into the war to fight for nobody. Before I get into the war, I go out, go away in the mountains, let the whiskers grow and nobody can find me.
- Q. Now, did the French consul come out there, or anybody representing the French consul to see you?
  - A. No, sir.

Mr. Dockweiler: All right. Will you please, Mr. Reporter, read the witness's answer.

(Last answer read by the reporter.)

- A. That is the fact.
- Q By Mr. Dockweiler: Well, now, Mr. Daven,

can't you tell us what happened as soon as Mr. Phelan went—coming to the house, what you said to him, and what he said to you, in which he made this statement that you claim he did. What was the first thing he said?

- A. Oh, well; I don't remember the first thing. He just came out to my house like he come once in a while, and we talked about some war question. That is how it started then.
  - Q. Well, now, this was early Sunday morning?
  - A. Yes, sir.
- Q. What was the first thing that he talked to you about that morning?
- A. That morning he started, when he come home, he started to talk to my wife about that matter.
  - Q. By the Court: About what?
  - A. Started to talk to my wife the first thing.
- Q. Well, what did he start to talk to your wife about?
- A. Well, he come home once in awhile and we talked about one thing and the other, and that is how he started.
- Q. By Mr. Dockweiler: Well, how did Ed. Phelan start to talk to your wife about the war? What did she say to him that caused him to talk about the war?
- A. Well, he talked to my wife about the war, because my wife's uncle, those two boys have to go in the war, and my wife told Ed. Phelan those two boys would have to go in the war. Maybe they kill those two boys any time. Ed. Phelan says, "No, I don't

go to war for nobody." That is when it come out and start to talk about that.

- Q. Well, then did you say anything to Ed. Phelan before he made any statement about the war?
  - A. No, sir.
  - Q. Did you have any conversation with him at all?
  - A. I had conversations every day.
- Q. Before he made this statement on that Sunday morning?
  - A. No, sir.
  - Q. What were you doing in the kitchen?
- A. Well, I guess—I sit down in the kitchen after my breakfast.
  - Q. Oh, you were eating breakfast?
  - A. After my breakfast.
- Q. Well, this conversation occurred soon after you ate your breakfast?
  - A. Yes, sir,
  - Q. You ate your breakfast in the morning?
  - A. Yes, sir.
  - Q. Did your wife eat with you?
  - A. Yes, sir.
  - Q. Did Ed. Phelan eat breakfast there?
  - A. No, sir.
- Q. All right. Now, when Ed. Phelan came in that morning, who talked first?
- A. I don't know. Phelan talk, and my wife talk; both of them started to talk about that. I didn't pay much attention to that, after I hear what they say.

The Court: Talk slower.

Q. By Mr. Dockweiler: Outside of what you have

stated, can you give us—can you tell us how the conversation started, what was said by you or by your wife, or by Mr. Phelan? Tell us all that was said there.

Mr. Palmer: We object to that, if the court please, that the witness has answered the question two or three times.

The Court: Well, I will overrule the objection. I don't know; maybe we can understand him better if he tells it over again. Read the question.

(Question read by the reporter.)

A. Well, I tell you a little while ago, the conversation started—

The Court: Slower, now.

- A. —because those two French boys have to go in the war.
  - Q. By Mr. Dockweiler: Who mentioned that?
- A. My uncle's wife come up one day, and my wife told Ed. Phelan those two boys have to go in the war.
- Q. That is, your wife told Ed. Phelan that these two boys had to go to war?
  - A. Yes, sir.
  - Q. Where were these two boys located?
  - A. On my uncle's ranch.
  - Q. Where is that located?
  - A. On Pequot Heights.
  - Q. Who is your uncle?
  - A. His name is Pequot.
  - Q. What is his first name?
  - A. I don't know the first name.
  - Q. How do you spell that?

- A. I don't know.
- O. You don't remember his first name?
- A. No, sir.
- Q. What is his last name?
- A. Pequot.
- Q. How do you spell that?
- A. I can't spell that good in English.
- Q. Well, please give the reporter some idea as to how to spell that name?
  - Mr. Palmer: If you know.
- Mr. Lawson: If you know how to spell it spell it, and if you don't, say so.
- A. I can't spell anyhow, because I can't spell in English.
  - Q. By Mr. Dockweiler: Well, spell it in French?
  - A. P-e-ke-o-t.
  - Q. What part of Pequot Heights does he live on?
- A. I am not sure of the place; I have never been in the place; I know he lives over there.
- Q. All right. Well, now, your wife told him about those two boys. What did she say to him. Now, tell us all that was said and how long Phelan remained there?
- Mr. Palmer. We object to the question, if the court please, as not cross-examination, and as having been answered two or three times, and as being a double or triple question.

The Court: Well, now, next time don't interrupt. Go back, Mr. Reporter, and read the question.

(Last question read by the reporter.)

Q. By the Court: Do you understand it now?

- A. Yes, sir.
- Q. Now, proceed and go slow?
- A. Well, Phelan was in the house that morning. My wife was telling these two French boys have to go in the war, and then Ed. Phelan he says, "I am no fool to go in the war to fight for France and England, and before I go in the war I am going to let my whiskers grow, going up in the mountains, and go in Nevada some place so nobody can find me."
  - Q. Is that all?
  - A. That is all.
  - Q. That Phelan said?
  - A. That Phelan said.
  - Q. Then what did your wife say?
  - A. I don't know what my wife say after that.

I didn't say anything. I didn't get angry. The conversation was pleasant and agreeable and no one was angry at the time.

- Q. As I understood, you had a daughter there?
- A. No, sir. Who?
- Q. Was your daughter there?
- A. No, sir.
- Q. By the Court: Your daughter?
- A. My daughter was there; yes, sir.
- Q. By Mr. Dockweiler: Your daughter?
- A. Yes, sir.

My daughter's name is Jennie Daven. She is fifteen years old. There were no other children there. There were only four people present, myself, my daughter Jennie, my wife, and Ed. Phelan. I was married nine years ago. This daughter was by a former

wife. I had one child before I was married to my present wife.

- Q. By Mr. Dockweiler: After Ed. Phelan made the statement that you say he did, was anything else said by him?
  - A. No, sir.
  - Q. Then did he walk out?
  - A. Walked out.
- Q. On that morning, did he give you any order for work to be done by you on that day or any subsequent day?
  - A. No, sir.

He apparently just dropped in for a friendly visit and remained about half an hour. He was in the habit of dropping around Suday mornings or Sunday afternoons and talking with me.

- Q. Did Dan ever come around and talk to you, his brother?
- Mr. Palmer: We object to that as incompetent, irrelevant and immaterial.

The Court: The objection will be sustained.

Mr. Dockweiler: Exception.

Q. Did Peterson come around and talk to you while there?

Mr. Lawson: Object to that on the same ground.

The Court: The objection will be sustained.

Mr. Dockweiler: Exception.

Mr. Boden talked to me about the case. I saw Mr. Boden in the Pequot station going after me. He did not tell me who told him to talk to me or who sent him to me.

I know Edna Phelan, John Joseph Phelan, the defendant's brother.

O. Did Edna ever talk to you on the ranch at any time while you were employed there?

Mr. Lawson: I object to that, Your Honor, as improper cross-examination, and incompetent, irrelevant and immaterial.

The Court: The objection will be sustained.

O. By Mr. Dockweiler: What, if anything, did Edna Phelan tell you about this case?

Mr. Lawson: Objected to, Your Honor, as purely hearsay; incompetent, irrelevant and immaterial.

The Court: Objection sustained.

Mr. Dockweiler: Exception.

I did not have any conversation about this case before Mr. Boden talked to me, and nobody has talked to me about the case since Mr. Boden did. He is the only person who has ever talked to me about the case.

Thereupon it was stipulated that the defendant Edward Phelan did not register. Whereupon the Government rested their case.

# Testimony of Edward Henry Phelan on Behalf of Defendant.

Edward Henry Phelan, the defendant, called as a witness in his own behalf, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Dockweiler:

My name is Edward Henry Phelan, and I reside at

(Testimony of Edward Henry Phelan.)

Whittier, and have all my life. I am the defendant in this case. I was born March 13th, 1886. I did not register on June 5th, 1917, because I was past the age on that day. I honestly believed and understood that I was thirty-one years and past. Had I believed that I was not thirty-one years of age, I certainly would have registered. I have no objections to this war, either conscientious or otherwise.

There was a time in my life when I believed that another date was my birthday. That was up until four years ago. My impression was that I was born July 13th, 1886. Four years ago that impression was corrected, and during that four years I have always believed that my birthday was March 13th, 1886. I got that information from my mother.

I heard the testimony of Mr. Daven and Mrs. Daven. Mr. Peterson and a Mexican by the name of Mr. De La Real were hired men, and myself and brother, Dan, also worked there. Mrs. Daven was not employed on the ranch. She simply lived there with her husband. There had been considerable discussion about the war between Mr. Peterson and Mr. Daven. Peterson worked on my mother's ranch during all the time Daven was there.

Q. By Mr. Dockweiler: Now, were you present, or did you ever overhear any conversations between Daven on the one side, and Peterson on the other, respecting any controversy arising out of the war.

Mr. Palmer. We object to that, if the court please, for the reason it is incompetent, irrelevant and immaterial.

(Testimony of Edward Henry Phelan.)

The Court: I don't see the materiality or relevancy of it, Mr. Dockweiler.

Mr. Dockweiler: Well, it is purely preliminary. I want to show that these two people were more or less in controversy on the war all of the time. We will lead up and show if he had any connection with it at all.

The Court: The objection will be sustained.

- Q. By Mr. Dockweiler: Did you, Mr. Phelan, visit on a Sunday morning or at about 1:00 o'clock on Sunday afternoon, or 2:00 o'clock on a Sunday afternoon, as Mrs. Daven testified, the place occupied by the Davens, on the first Sunday in May?
  - A. No, sir; I did not.
- Q. Did you have any conversation in the kitchen of the Daven home on the first Sunday in May of this year respecting war?
  - A. No, sir.
- Q. Did you on the first Sunday of May, 1917, in the kitchen of the house occupied by the Davens on the Phelan old home place either at nine o'clock, or ten o'clock, or between nine and ten o'clock on the morning of the first Sunday in May, as related by Mr. Daven, or at one o'clock, or at two o'clock in the afternoon on the first Sunday in May, as related by Mrs. Daven, speak to Mr. or Mrs. Daven, or to their daughter, or within their hearing, or any other persons, that you would not register, because you were not going to be killed for any other nation, and that you would disguise yourself and go out into the mountains,

(Testimony of Edward Henry Phelan.) either of Arizona or Nevada or use language of similar kind or import?

- A. No, sir.
- O. On that occasion?
- A. No, sir.
- O. Or on either of those occasions?
- A. No, sir.
- Q. Or at any other time?
- A. No, sir; I did not.
- Q. Did you ever, in the presence of Mr. Daven and Mrs. Daven and the daughter, or in the presence of either of them, at any time, make any statement in substance or in effect that you would not fight for France or for England, and that you would not register, and that you would let your whiskers grow, and thus disguise yourself and go to the mountains, or go to Arizona, or Nevada, or any other place of the habitable globe?
  - A. No, sir; I did not.
- Q. Did you use language of that kind, or of that import?
  - A. No, sir.
  - Q. Or in substance, something like that?
  - A. No, sir.
  - Q. Did you ever grow a beard?
  - A. No, sir.
- Q. Did you on June 5th, 1917, which was the general registration day throughout the United States, do anything towards the enforcement of the draft law, and if so, what was it?

Mr. Lawson: Your Honor, objected to as incom-

(Testimony of Edward Henry Phelan.) petent, irrelevant and immaterial, having absolutely nothing to do with the issue in this case.

The Court: Objection will be overruled.

A. Yes, sir; I had taken Mr. Peterson down to Los Nietos to register.

- Q. By Mr. Dockweiler: On that date?
- A. Yes, sir.
- Q. Did you ever advise any human being not to register?
  - A. No, sir.
- Q. As required by the proclamation of the President and the laws of the United States?
  - A. No, sir; never.
- Q. Have you at any time in your life done anything, that is—well, have you at any time either prior to the enactment of the conscription law or subsequent thereto, done anything to hinder or impede or to delay the carrying out of that law in any manner whatsoever, directly or indirectly?
  - A. No, sir.

Mr. Dockweiler: Pardon me, but may I ask—I had another question.

Mr. Lawson: I will withdraw that then.

Q. By Mr. Dockweiler: Mr. Phelan, with reference to the Davens, what, if anything, occurred near or about the first part of May in connection with Mrs. Daven and your relationship with Mrs. Daven in reference thereto?

A. Why, when Mrs. Daven-

Mr. Palmer: If the court please, we object to that

(Testimony of Edward Henry Phelan.) question as incompetent, irrelevant and immaterial.

The Court: The objection will be sustained.

Mr. Dockweiler: I desire, Your Honor—exception to the ruling—I desire, Your Honor, now, at this time, to show by this witness—

Mr. Palmer: We object, if the court please, to counsel stating in the presence of the jury a matter that he proposes to prove, that the court has ruled to be incompetent.

Mr. Dockweiler: Well, how may I-

The Court: I suppose, Mr. Dockweiler, that your idea is to offer evidence tending to show the relations, whether friendly or otherwise, between this defendant and the other people?

Mr. Dockweiler: Yes, Your Honor.

The Court: The evidence is immaterial. In a collateral matter of that kind, you are bound by the answer of the witness, as I understand the law,—and if you want to state—if you want to make a record of it, you may write out what you desire to say and file it with the reporter, and consider it as being your offer on that question.

Mr. Dockweiler: That is at the conclusion—during the recess?

The Court: Yes, sir.

Mr. Dockweiler: Yes, Your Honor. All right, thank you.

## Cross-Examination

By Mr. Lawson:

I was under the impression that I was born July 13th, 1886, up until the year 1913, four years ago. I

(Testimony of Edward Henry Phelan.) was nearly twenty-seven at that time. I believed for twenty-seven years that I was born July 13th, 1886. I was living with my mother during that time, and during that time whenever I had an occasion to state my birthday, I gave it as July 13th, 1886. I don't recall the occasion when I stated my birthday, but I do recall that I gave July 13th, 1886, and I understood it was that. During those twenty-seven years I did not have an idea that I was born on any other day, and I was twenty-seven years old when I changed my mind. I got the information that I was born March 13th, 1886, from my mother; she told me that I was born on that day. Since that date I have not held myself out to anybody as having been born March 13th, 1886. I have not told anyone since that time that I was born March 13th, 1886. It did not surprise me very much when I was told that my birthday was in March, and it was no shock to me to learn that my birthday was in March. I was then twenty-seven years old. The belief that had existed in my mind for twenty-seven years was then overturned without surprise on my part. and since that time I have believed that I was born March 13th, 1886, but I have never held myself out as having been born on that date.

I have not taken out any insurance of any kind, no life insurance since four years ago. I don't know that I have taken out any accident insurance; I don't think that I did. I could not say whether I ever took out a policy of accident insurance in the National Casualty Company in 1914. I have no recollection of it. I think my brother is the agent for that company. I

(Testimony of Edward Henry Phelan.) could not say whether he solicited me to take out a policy or not.

Since the information was given me that my birth-day was March, I have not told anyone about it, and I have never signed a paper since that time. I don't recall that the fact that my birthday was then was a source of comment around the house; no one said anything about it. There was no surprise. My mother gave me the information when I was twenty-seven years old, and the rest of the world doesn't know about it.

#### Redirect Examination

By Mr. Dockweiler:

I have not had any occasion that I recall, apart from June 5th, 1917, registration day, to give my birthday or to use my birthday during the last four years.

Q. Mr. Phelan, was there any other instance in your family of a brother for years observing a birth-day in one month erroneously?

Mr. Lawson: Your Honor, objected to as incompetent, irrelevant and immaterial.

The Court: I will sustain the objection.

Mr. Dockweiler: Exception. I desire to prove by this witness—

Mr. Lawson: Now, Your Honor, object to what counsel expects to prove when the objection has been sustained.

The Court: Well, I will withdraw the ruling and let him state it.

Mr. Dockweiler: I offer to show by this witness, Your Honor, that the brother of this witness, John (Testimony of Edward Henry Phelan.)

Joseph Phelan, five years regarded and observed July 22nd as his birthday, when, as a matter of fact, years after it was discovered or ascertained that June 22nd was his birthday.

Mr. Lawson: Your Honor, that witness is in court and can be produced; it is the best evidence.

The Court: Well, the objection will be sustained now.

Mr. Dockweiler: That is all. Exception.

Whereupon, the court duly admonished the jury and took a recess for five minutes. At the expiration of the recess, the jury being present, the proceedings of the trial were resumed.

# (Testimony of Mrs. Mary Phelan on Behalf of Defendant.)

Mrs. Mary Phelan, a witness called on behalf of defendant, having been first duly sworn, testified as follows:

## Direct Examination

By Mr. Dockweiler:

My name is Mrs. Mary Phelan, and I am the mother of the defendant. I am sixty-eight years old and reside in Whittier, and have resided there continuously since 1873. I am a widow.

The defendant, Edward Phelan, was born on March 13th, 1886. There were present at the time of the birth a midwife and a woman that lived in the neighborhood. The midwife was a Spanish woman by the name of Guara. I don't know how to spell the name. The midwife is dead and has been for quite a number

of years. The neighbor who was present is Mrs. Martinez. She is alive and in the court room at the present time. Aside from the midwife, who is dead, and Mrs. Martinez, the neighbor, and myself, there was no one else present at the time of Edward's birth. Since his birth Edward has lived with me continuously, and during all this time we have lived at Whittier.

I have a son by the name of John Joseph Phelan.

Q. Do you know whether John Joseph Phelan had for any period of time regarded July 22nd as his birthday—

Mr. Lawson: Just a minute.

Mr. Dockweiler (continuing): —instead of his real birthday, June 22nd?

Mr. Lawson: Your Honor, I object to that as incompetent, irrelevant and immaterial.

Mr. Palmer: Leading and suggestive.

Mr. Lawson: And leading and suggestive, and calling for a conclusion of the witness.

A. I do.

The Court: Wait a minute. The objection will be sustained.

Mr. Dockweiler: Exception.

Q. Do you know whether your son, John Joseph Phelan, for any period of time had mistakenly regarded a certain day as a birthday?

Mr. Lawson: Just a minute now; don't answer that. Objected to on the same grounds, Your Honor.

The Court: The objection will be sustained.

Mr. Dockweiler: Exception. Cross-examine.

(Testimony of Mrs. Mary Phelan.)

Cross-Examination

By Mr. Lawson:

I will give the birthdays of each one of my children. My oldest, Dan Phelan, was born June 10th, 1874; Nellie Phelan was born October 28th, 1875; John Joseph was born on June 22nd, 1877; Annie Phelan was born on April 30th, 1880; Thomas Phelan was born on March 5th, 1882; Billie was born on March 6th, 1884; and Ed was born on March 13th, 1886. I have one more which is not on my record. I did not keep track of her age for she had not baptism; she didn't live long. I don't remember the year that she was born; I didn't keep track of it. I don't remember when she was born, but that is the record of the birthdays of all the children I have had.

I remember that Ed was born on March 13th, 1886; that is borne on my memory. I remember the circumstances when he was born. There was the midwife, Mrs. Martinez and myself present. I remember independently of everything else that his birthday was March 13th, 1886. The day that Ed was born I guess that my husband was around the house. I couldn't tell you where he was. I know he was around the house somewheres, but he was not in the bedroom where the baby was born. I know that Edward was born March 13th, 1886, and I have always been under that impression and always will be, and have never acted any differently or said differently. I have always held him out as having been born March 13th, 1886. I never gave any other date. I always gave March 13th, 1886. Nobody ever asked me anything about it.

I did not tell anybody because nobody asked me. I never had any occasion to tell his birthday.

- Q. Whenever you had occasion to?
- A. I never had any occasion.
- Q. Never had any occasion?
- A. No, sir; never.
- Q. Never had any occasion to put down his birth-day?
- A. Until four years ago, my son came there, wanted his birthday, and he for his long lifetime—
- Q. Now, just a moment. Just answer the question, Mrs. Phelan.
  - A. Yes, sir.
- Q. You say that four years ago was the first time that you ever had occasion to give the birthday of Edward to anybody else; is that right?
  - A. Four years ago my son-
- Mr. Dockweiler: She didn't say anything of the kind.
- Q. By Mr. Lawson: Answer the question yes or no. Read the question.

(Last question read by the reporter.)

- A. Yes, sir.
- Q. That is the first time?
- A. That is the first time.

I never told anybody what his birthday was before that time. I never was asked and I never told anybody else and never made a statement. I am positive of that.

(Counsel handing witness petition to set aside homestead.)

That looks like my signature on the document you handed me. It is not like I write now. It looks like it at that time. I don't know when my husband made his will. If it is set out in that paper that at the time of my husband's death on June 1st, 1889, Edward F. Phelan was aged about two years, it is a mistake. Whoever made that document made a mistake. If I signed it somebody presented it to me and told me to sign it.

Mr. Dockweiler: Yes, Your Honor, that was signed by the witness.

That looks like my signature; it looks like it. They did not read it to me, and I did not know what was in it. Whoever wrote it did not know anything about it. That is my statement and my signature. The document is a typewritten document. I had six living children on June 4th, 1866, and my husband was mistaken when he stated in that document that his family consisted of a wife and five children, and the man who wrote the document was also mistaken when he set out the age of my son.

Thereupon the document was offered and received in evidence, marked Government Exhibit 2, and is as follows:

"In the Superior Court of the county of Los Angeles, state of California.

In the Matter of the Estate of Thomas Phelan, deceased.

"To the Honorable the Above-Entitled Court:

"The petition of Mary Phelan respectfully shows

that Thomas Phelan died on or about the 1st day of June, 1889, at the county of Los Angeles, state of California;

"That at the time of his death the said Thomas Phelan was a resident of the said county of Los Angeles, in said state, and left estate therein consisting of real and personal property;

"That the said deceased left a last will and testament, whereby and wherein he appointed your petitioner as the executrix thereof;

"That by an order of this court, which was duly made and given on the 9th day of January, 1890, the said last will and testament was duly admitted to probate, and letters testamentary thereon were ordered to be issued to your petitioner;

"That on the said 9th day of January, 1890, your petitioner duly qualified as such executrix, and letters testamentary on said last will and testament were in due form on said day duly issued to her, as such executrix, and she has ever since been and is now the duly appointed, qualified and acting executrix of the last will and testament of said deceased:

"That on or about the 20th day of January, A. D. 1873, the said Thomas Phelan and your petitioner intermarried and were ever thereafter up to his said death husband and wife;

"That on the 4th day of June, A. D. 1886, the said Thomas Phelan duly signed and executed a declaration of homestead, in the words and figures following, towit:

"I do hereby certify and declare that I am married, and that I do now at the time of making this declaration actually reside with my family on the land and premises hereinafter described; that my family consists of a wife and five children.

"That the land and premises on which I reside are bounded and described as follows, to-wit, lying and being in the county of Los Angeles, state of California:

"Commencing at the southwesterly corner of the lands now or formerly of J. F. Isbell, in said county, and running thence along the southwesterly line of the lands now or formerly of one Wade south 50° 30' east to the northwesterly line of the certain lands now or formerly of Messrs. Tyler and Dunlap to the northerly line of the lands formerly of one King; thence northwesterly along the northeasterly line of said Kings lands and the northeasterly line of the lands now or formerly of Jacob Ott to the northerly corner of said Ott lands; thence northerly along the easterly line of certain other lands now or formerly of said Tyler and Dunlap to the southeasterly line of the Norwalk and Puente Mills road; thence easterly along the southeasterly line of the said road to the place of beginning, containing 101 acres of land, more or less, and being situated in Los Nietos township, in said county; said lands are further described as follows, consisting of two tracts:

"First: That certain tract consisting of about 61 acres of land, situated in said township and county, described in a certain deed, dated October 18th, 1873, executed by Pio Pico to Thomas Phelan, and recorded in the office of the county recorded of Los Angeles county, state of California, on the 20th day of October,

1873, in book 26 of deeds, at page 349 thereof, to which said deed and the record thereof, as aforesaid, reference is herewith had for a more particular description of said first tract.

"Second: That certain other tract containing about 40.66 acres of land, situate in said township and county, described as follows:

"Commencing at the southwesterly corner of the Strong 320 acre tract at a 4 by 4 redwood post, thence according to the true meridian (the variation being 14° 13′ east) north 39° 30′ east 22.72 chains; thence north 50° 30′ west 13.33 chains to a station; thence north 50° 30′ west 22.42 chains to a point; thence south 18° 15′ east 42.37 chains to the place of beginning.

"That it is my intention to use and claim the said lot of land and premises above described, together with the dwelling house thereon and it appurtenances as a homestead, and I do hereby select and claim the same as a homestead.

"That the actual cash value of said property I estimate to be five thousand dollars.

(Signed) THOMAS PHELAN. (Seal) In presence of

S. HALEY.

"That the said Thomas Phelan duly acknowledged the said declaration of homestead as a grant of real property before an officer entitled to take acknowledgments, and the said acknowledgment was duly certified in writing, attached to said declaration of homestead, on the said 4th day of June, 1886, and the said declaration together with the certificate of acknowledgment was on the said 4th day of June, 1886, duly filed for record, and recorded at the request of the said Thomas Phelan in book 7 of declarations of homestead of married persons, at page 8 et seq. thereof, in the office of the county recorder of said Los Angeles county;

"That each and all of the statements in said declaration of homestead contained were, at the time of the making of said declaration, and now are, true;

"That all the land described in said declaration of homestead was acquired by the said Thomas Phelan after his marriage aforesaid with your petitioner, and all of the said property therein described was, at the time of the making and filing of said declaration of homestead, community property of the said Thomas Phelan and your petitioner, and ever thereafter up to the death of the said Thomas Phelan continued, subject to such declaration, to be such community property, and on the death of said Thomas Phelan the whole of the property described in said declaration of homestead vested in and became the property of your petitioner as the survivor;

"That on the 6th day of May, 1891, your petitioner made and returned to and filed in this court an inventory and appraisement, purporting to show the property belonging to the estate of said deceased; that at the time the said inventory was so made and filed, your petitioner, through inadvertence and mistake, and in ignorance of her rights to the said property described in said declaration of homestead, returned the said property in said inventory as part of the assets of said estate;

"That it was never her intention to relinquish any of her rights to any part thereof;

"That the said Thomas Phelan in and by his said last will and testament declared all of his property to be community property acquired since his marriage with your petitioner, and devised and bequeathed that all of his property should be divided among and between your petitioner and their children in the same ratable proportions and shares that it would have been by law, if he had died without a will;

"That at the time of his death, he left surviving him, as such devisees and legatees, or such heirs at law, your petitioner, who is his widow, and six children, to-wit: Daniel H. Phelan then aged about 14 years, Nellie R. Phelan then aged about 13 years, John J. Phelan then aged about nine years, Thomas F. Phelan then aged about seven years, and Edward F. Phelan then aged about two years.

"Wherefore, your petitioner prays that a time and place may be appointed for the hearing of this petition, and such notice may be given thereof as the court may deem proper, and that on such hearing an order may be made withdrawing from the administration upon the estate of Thomas Phelan, deceased, all of the property described in said declaration of homestead, and that the same may be set off to your petitioner as the owner thereof; and that such other and further or different order may be made as to the court may seem meet and proper.

"Dated Los Angeles, Cal., Feby. 9th, 1892.
(Signed) MARY PHELAN."

A. W. HUTTON,
Atty. for Petitioner.

"State of California, County of Los Angeles-ss.

"Mary Phelan, being duly sworn, deposes and says that she is the petitioner named in the foregoing petition in the above entitled matter; that she has heard read the foregoing petition and knows the contents thereof; that the same is true of her own knowledge, except as to the matters which are therein stated on her information or belief, and as to those matters that she believes it to be true.

## MARY PHELAN."

Subscribed and sworn to before me this 9 day of Feby., 1892.

T. H. WARD, Clerk. By A. W. Seaver, Deputy.

(Endorsed:) "Filed Feby. 10, 1892. T. H. Ward, clerk; by A. W. Seaver, deputy."

The names of my children who were living at home at the time that homestead was filed on June 4th, 1886, are Daniel, Nellie, Joe, Annie, Tom and Ed. William was dead at that time. Annie was alive at that time. William died before my husband's death. I did not keep any track of the time of his death. I don't remember the date, but it was before my husband's death. My husband died June 1st, 1889.

Whereupon, the jury was duly adminished and adjournment was taken until two o'clock p. m. At two o'clock p. m., court reconvened, and the jury being present, the proceedings of the trial were resumed.

Mrs. Mary Phelan recalled.

Cross-Examination

resumed.

By Mr. Lawson:

I am now drawing a pension from the government. I don't remember where I made the application. I have been working at it ever since my husband died. I have made several applications but I don't remember how many. I tried it a long time and then I stopped for two or three years. I couldn't get it, and then the man back in Washington wrote to me. I don't remember when I finally got it. I couldn't say whether it was eight years ago or not. I don't remember when I first made the application. I don't remember when I made it. I have made several applications.

- Q. Isn't that your signature (exhibiting document to witness)?
- A. It looks like it, but I couldn't say whether it is or not.
- Q. To the best of your recollection that is your signature?
  - A. It doesn't look like the writing that I write now.
  - Q. But it was the writing you wrote at that time?
  - A. It might have been.
  - Q. It might have been?
  - A. Yes, sir.
- Mr. Palmer: You had better identify that, Mr. Lawson.
  - Mr. Lawson: This document is submitted—
- Mr. Palmer (interposing): Let the reporter identify it as the one you just asked her about.

The Court: What exhibit is it? Let the clerk identify it.

Mr. Lawson: Exhibit 3, Your Honor, for identifica-

The Court: That is what you just submitted to her just now?

Mr. Lawson: It is the one I just submitted to her, Your Honor, yes.

The Court: Let it be marked Exhibit 3.

(The document so offered and identified was thereupon marked "United States Exhibit No. 3.")

Q. By Mr. Lawson: Isn't this your signature? (Exhibiting document to witness.)

A. I will have to say as I did to the other one, it looks like my signature, but I can't remember signing it.

Q. It looks like your signature?

A. Yes, sir.

Q. And that one (exhibiting another document to witness).

A. It is something similar.

Q. That is your signature?

A. It is something similar to the other.

The Court: Do you think they are your signatures or not? What is your impression about it?

The Witness: It was years ago. It may be my signature.

The Court: What is your impression about it? Do you think it is or is not your signature?

The Witness: It looks something like my signature.
The Court: That is not the question. Do you think

it is your signature or do you think it is not your signature?

Mr. Dockweiler: This is no original document.

Q. By Mr. Lawson: Is that or is it not your signature?

A. It looks like mine, but I couldn't say. I don't know whether it is or not.

Mr. Lawson: I submit this also for identification.

The Court: It will be No. 4 for identification.

(The document so offered and identified was thereupon marked "United States Exhibit No. 4.")

Mr. Lawson: Your Honor, may we now offer these two exhibits, marked "Exhibits 3 and 4 for Identification," as evidence?

Mr. Dockweiler: Let us take one at a time.

The Court: Take No. 3.

Mr. Dockweiler: Take No. 3, yes. The document that is marked Exhibit No. 3 is dated October 10, 1917. That is the certificate. We object to it upon the ground that the same is incompetent, irrelevant and immaterial and that no proper foundation has been laid therefor.

The Court: Just pass it up and let me see it. Mr. Lawson, will you kindly step up here, please?

(Mr. Lawson thereupon steps to the bench.)

The Court: The objection will be overruled.

Mr. Dockweiler: I note an exception.

Mr. Lawson: I will now read the record.

Mr. Dockweiler: What exhibit is that?

The Court: Exhibit No. 3.

Mr. Lawson: Exhibit No. 3, yes. (Reading.) "Deposition 'A.' Case of Mary Phelan, No. 411,751. On this 10th day of November, 1909, at 2 miles from Whittier, county of Los Angeles, state of California, before me, F. W. Tuckerman, a special examiner of the bureau of pensions, personally appeared Mary Phelan, who, being by me first duly sworn to answer truly all interrogatories propounded to her during this special examination of aforesaid claim for pension, deposes and says:

I am 58 years of age; my business address is Whittier, California, R. F. D. No. 2, box 82, occupation farming. I am the widow of Thomas Phelan, who was a soldier in a Vermont regiment, but I do not remember the regiment and company. I never had his discharge papers. I never saw my husband have it. I have heard him talk of his army experience, but do not remember the name of his officers. Ed. Powers, now dead, who used to be a ranch hand on the place for my husband and for me was a soldier and drew a pension and he remembered the regiment and company my husband served in, though they were not in the same organization. My husband, Thomas Phelan, died right here at home on June 1st, 1889. He took cold about a year and a half before he died, and it turned into consumption, which caused his death. My husband did not draw a pension. He never said whether he applied for a pension. I made several applications for pensions. I do not know how many. The applications now shown me, dated October 12th, 1880, May 12th, 1908, and August 15th, 1890, bear my signatures

and were executed by me before the several officers named therein, and the witnesses named were present at the several dates of execution thereof. My maiden name was Mary Ryan. I was married to Thomas Phelan at the old Plaza church on January 20th, 1873, by Father Mora. I had not been previously married. I was born August 21, 1851, at Templemore, Ireland, so I was 21 years old when I married. Thomas Phelan had not been previously married.

I had known him only about six months before our marriage. I got acquainted with him through Sister Schoolascica of Los Angeles, now dead, who knew him a long time. He was born in Ireland and came to America at an early age. His parents are dead. He has one brother and one sister living. The brother is William Phelan, who lives near Jacksonville, Illinois, about six miles in the country. I do not know whether his post office address is Jacksonville or not. He is familiarly called "Uncle Billy," and is well known. The sister is Mrs. Allan Phelan, 967 Church street, San Francisco, California. That is all the immediate relatives he has in the United States. All the rest are dead. I do not know whether my husband enlisted more than once. I never heard him say, or if I did, I do not remember it. I do not know of any one who knew my husband in early years, aside from his brother and sister, and consequently cannot refer to any others for previous knowledge as to whether he enlisted more than once, and as to his non-prior marriage. I left my home in Ireland in March, 1872. I landed in New York and came direct to Los Angeles

by way of San Francisco. I came to an aunt of mine, Mrs. Wade, now dead. I landed in Los Angeles in May, and was married the following January. The only persons living who knew me before my marriage that I can think of are Mrs. Alice Nicholson and Mrs. Abbie Lynch. My husband, Thomas Phelan, and I lived together as husband and wife until he died. We were not separated nor divorced. I have not remarried since my husband, Thomas Phelan, died. We had six children living when my husband died, and we had lost one before my husband died. The names and dates of birth are as follows: I have them recorded. Daniel Hatchett, born June 10th, 1874; Nelly Rosa, born September 28, 1875; John Joseph, born June 22nd, 1877; Annie Winifred, born April 30th, 1880; Thomas Francis, born March 5th, 1882; Willie Bernard, born March 6th, 1884; Eddie Henry, born July 13th, 1886. All of the above named were born here on the home place. The above record is in my family (But the publication not shown in Bible. Bible. F. W. T.) Of the above named, Willie died October 10th, 1885, before his father died. Annie W. died November 13th, 1900, as shown by my Bible records (copied from the record. F. W. T.). We had also a child named Mary who died in 1879 when one day old. John Joseph's name was written Juan Jose in the baptismal record, but his name is John Joseph.

James Phelan, mentioned in my first application for pension, was not my son nor the son of my husband, but the son of my husband's brother, Daniel Phelan, who was a widower, and who died shortly before my

husband died, and we thought of adopting him. Daniel Phelan was not a soldier. I do not know the pension law and supposed he was entitled with the rest of the children. All the children are living except Mary. Annie and Willie. My husband contracted the disease of which he died right here a year and a half before he died. I cannot prove that he contracted this fatal disease in the army. I never intended to state that he contracted his fatal disease in the army, if it is so stated in my first application. I do not so understand it. The officers did not read it to me. That which appears to be a joint affidavit of Edward W. Powers and I. C. Hvatt I believe to be the statement of Edward W. Powers. Powers knew my husband before I was married. He lived here on our place as a laborer during my husband's life, and for some years thereafter, until he went to the soldiers' home, where he died. J. C. Hyatt did not live there. (Signed) Mary Phelan, deponent.

Subscribed and sworn to before me this 10th day of November, 1909, and I certify that the contents were fully made known to deponent before signing. F. W. Tuckerman, Special Examiner."

The following deposition is not pertinent at this point, and with your permission, Mr. Dockweiler, I will submit that as read. This is duly certified to.

Mr. Dockweiler: What does the other refer to?

Mr. Lawson: If you want it read, I will read it. It just refers to the property which she has.

Mr. Dockweiler: No, I do not care about it.

Mr. Lawson: This is duly certified to by the commissioner.

"Department of the Interior Pension Bureau Washington, D. C., October 10, 1917.

I, G. M. Saltzgaber, Commissioner of Pensions, and custodian of the records of the Bureau of Pensions, do hereby certify that the attached seven pages are true photostat copies of a deposition made by Mary Phelan, November 10, 1909, in connection with her claim for pension as widow of Thomas Phelan, Co. F, 12th Vt. Mil. Inf., since allowed by certificate number 697667, before F. W. Tuckerman, then duly qualified as a special examiner of the Bureau of Pensions.

In testimony whereof, I have hereunto subscribed my name and caused the seal of the Pension Bureau to be affixed, the day and year above written.

G. M. SALTZGABER, Commissioner of Pensions."

Mr. Lawson: Your Honor, I submit these other applications as evidence, as Exhibit Number 4.

The Court: Exhibit 4.

(The documents so offered and identified were thereupon marked: "United States Exhibit Number 4.")

Mr. Dockweiler: We object to the introduction of Exhibit Number 4 on the ground that the same is incompetent, irrelevant and immaterial, no sufficient foundation having been laid therefor. Of course, it is stipulated that these documents, upon their face, do not

appear to be original documents, but appear to be what are known as photostats, whatever that may be.

Mr. Lawson: The certificate on the outside clearly indicates the character of the copy. It is a photostatic copy of the written record.

The Court: That raises a new question to me. I do not know anything about it.

Mr. Dockweiler: Your Honor, I assumed, of course, that the court had looked at the record. It is in now, however.

The Court: This document number 4 seems to be of the same character.

Mr. Palmer: The deposition already introduced identifies this.

The Court: How is that, Mr. Palmer?

Mr. Palmer: I say the deposition which is introduced identified these copies and states in there that she did execute these.

Mr. Dockweiler: The record is made now.

The Court: The objection will be overruled.

Mr. Dockweiler: I note an exception.

Mr. Lawson (reading): "Widows' declaration for pension or increase of pension. This must be executed before a court of record or some officer thereof having custody of the seal.

State of California, County of Los Angeles-ss.

"On this 12th day of October, A. D. one thousand eighteen hundred and eighty-nine, personally appeared before me, clerk of the Superior Court of record within and for the county and state aforesaid, Mary Phelan, aged 36 years, who, being duly sworn according to

law, makes the following declaration in order to obtain the pension provided by acts of Congress granting pensions to widows: That she is the widow of Thomas Phelan, who enlisted under the name of Thomas Phelan in company .... of the Seventh Regiment, Vermont Infantry, in the war of the rebellion, who died of disease of the lungs (which he had contracted in the army and line of duty), at Los Nietos, Los Angeles county, California, on the first day of June, A. D. eighteen hundred and eighty-nine; that she was married under the name of Mary Ryan to said Thomas Phelan on the 20th day of January, A. D. 1873, by Reverend Father Marah, C. P., at Los Angeles, California, there being no legal barrier to such marriage; that neither she nor her husband had been previously married (that neither herself nor her late husband had been previously married); that she has to present date remained his widow; that the following are the names and dates of birth of all his legitimate children yet surviving who were under 16 years of age at father's death, viz.:

- 1. Daniel Phelan, of soldier, by applicant, born June 10, 1874.
- 2. Nellie Phelan, of soldier, by applicant, born September 28th, 1875.
- 3. John Phelan, of soldier, by applicant, born June 22, 1877.
- 4. James Phelan, of soldier, by applicant, born February 26th, 1879.
- 5. Annie Phelan, of soldier, by applicant, born April 30th, 1880.

- 6. Tommie Phelan, of soldier, by applicant, born March 5, 1882.
- 7. Willie Phelan, of soldier, by applicant, born March 6, 1884.
- 8. Eddie Phelan, of soldier, by applicant, born July 13, 1886.

That she has not in any manner engaged in nor aided or abetted the rebellion in the United States: that no prior application has been filed by either the soldier or herself, so far as she knows; that she hereby appoints, with full power of substitution and revocation, James Thomas Turner of Washington, D. C., her attornev to prosecute the above claim; that her residence is number ...., Los Nietos, Los Angeles county, California, and her post office address is the same. Mary Phelan. Signature of claimant. 2. W. H. Josleyn. 3. Mark Anthony. Two witnesses who can write, sign here.

"There personally appeared W. H. Josleyn, residing at Whittier, California, and Mark Anthony, residing at the same place, persons whom I certify to be respectable and entitled to credit, and who, being by me duly sworn, say that they were present and saw Mary Phelan, the claimant, sign her name to the foregoing declaration; that they have every reason to believe from the appearance of said claimant and their acquaintance with her that she is the identical person she represents herself to be; and that they have no interest in the prosecution of this claim. I. W. H. Josleyn.

2. Mark Anthony. (Signatures of affiants.)

"Sworn to and subscribed before me this 12th day

of October, A. D. 1889, and I hereby certify that the contents of the above declaration, etc., were fully made known and explained to the applicants and witnesses before swearing, and that I have no interest, direct or indirect, in the prosecution of this claim. (Signed C. H. Dunsmoor, clk. By A. B. Whitney, deputy.)"

"Act of June 27th, 1890. Declaration for widow's pension. To be executed before a notary public, justice of the peace or any officer competent to administer oaths who has a seal.

"State of California, County of Los Angeles—ss.

"On this 15 day of August, A. D. one thousand eighteen hundred and ninety, personally appeared before me, J. F. Meredith, a county clerk, within and for the county and state aforesaid, Mary Phelan, aged 37 years, a resident of Los Nietos, county of Los Angeles, state of California, who being duly sworn, according to law, declares that she is the widow of Thomas Phelan, who enlisted under the name of Thomas Phelan on the 23rd day of August, A. D. 1863, in company F, 12th Vermont Infantry, some time in July, 1863, and served at least 90 days in the late war of the rebellion, who was honorably discharged and died of lung disease, June 1st, 1889; that she was married under the name of Mary Ryan to said Thomas Phelan on the 20th day of January, 1873. by Bishop Mora at Los Angeles, California, there being no legal barrier to said marriage; that she has not remarried since the death of the said Thomas Phelan; that she is without other means of support than her daily labor; that names and dates of birth

(Testimony of Mrs. Mary Phelan.) of all the children now living under sixteen years of age of the soldier are as follows:

Daniel, born June 10, 1874.

Nellie, born September 28th, 1875.

John, born June 22, 1877.

Willie, born March 6, 1884.

James, born February 26, 1879.

Annie, born April 30, 1880.

Tommie, born March 5, 1882.

Eddie, born July 13, 1886.

"That she has heretofore applied for pension and the number of her former application is .....; that she makes this declaration for the purpose of being placed on the pension roll of the United States, under the provisions of the Act of June 27th, 1890.

"She hereby appoints with full power of substitution and revocation J. Thomas Turner, attorney-at-law, Washington, D. C., her true and lawful attorney to prosecute her claim, the fee to be \$10.00 as prescribed by law; ther her post office address is Los Nietos, county of Los Angeles, state of California. Mary Phelan, (claimant's signature.) I Daniel Phelan. Reyes A. Serrano. (Two witnesses who write, sign here.)"

"Also personally appeared Donald Phelan, residing at Los Angeles, and Reyes A. Serrano, residing at Los Angeles, persons whom I certify to be respectable and entitled to credit, and who, being by me duly sworn, say that they were present and saw Mary Phelan, claimant, sign her name (or make her mark) to the foregoing declaration; that they have every

reason to believe from the appearance of said claimant and an acquaintance with her of three years and ten years, respectively, that she is the identical person she represents herself to be; and that they have no interest in the prosecution of this claim. (Signed) Daniel Phelan, Reyes A. Serrano.

"Sworn to and subscribed before me this 15th day of August, A. D. 1890, and I hereby certify that the contents of the above declaration, etc., were fully made known and explained to the applicant and witnesses before swearing, including the words 'Notary Public,' erased, and the word . . . . . . . . added, and that I have no interest, direct or indirect, in the prosecution of this claim. J. M. Meredith, clk., by A. B. Whitney, deputy.

"The Act of June 27th, 1890, required in widow's case.

- 1. That the soldier served at least 90 days in the war of the rebellion and was honorably discharged.
- "2. Proof of soldier's death (death cause. Need not have been due to army service.)
- "3. That widow is 'without other means of support than her daily labor.'
- "4. That widow was married to soldier prior to June 27th, 1890, date of the act.
- "5. That all pensions under this act commence from date of receipt of application (executed after the passage of act) in Pension Bureau."

Act of April 19, 1908. Declaration for widow's pension.

(Testimony of Mrs. Mary Phelan.) State of California, County of Los Angeles—ss.

"On this 12th day of May, A. D. nineteen hundred and eight, personally appeared before me, a notary public within and for the county and state aforesaid, Mary Phelan, aged 67 years, a resident of Whittier, county of Los Angeles, state of California, who, being duly sworn according to law, makes the following declaration in order to obtain pension under the provisions of the Act of Congress approved April 19, 1008.

"That she is the widow of Thomas Phelan who was enrolled under the name of Thomas Phelan on the 23rd day of August, 1862, in company F, 12th Vermont regiment and honorably discharged on the 1st day of July, 1863, having served 90 days or more during the civil war. He was never in the military or naval service of the United States: that she was married under the name of Mary Ryan to said soldier at Los Angeles, on the 20th day of January, 1873, by Father Mora; that there was no legal barrier to the marriage; that she had not been previously married; that the soldier had not been previously married; that the said soldier died June 1, 1880, at Whittier; that she was not divorced from him; that she has not remarried since his death; that the names and dates of birth of all the children of the soldier now living and under 16 years of age at the date of the soldier's death, are as follows: (If there was a prior marriage of either the date and place of death or divorce of former consort or consorts, should be stated.) (If the soldier left no children, the claimant should so state.)

Daniel H. Phelan, born June 10, 1874, at Whittier; Nellie B. Phelan, born September 28th, 1875, at Whittier;

John J. Phelan, born June 22, 1877, at Whittier; Thomas F. Phelan, born March 5, 1882, at Whittier; Edward H. Phelan, born July 13th, 1886, at Whittier;

That she has heretofore applied for a pension; that she hereby appoints I. A. Gangower of Washington, D. C., her true and lawful attorney to prosecute this claim and direct that the sum of \$10.00 be paid as fee for services rendered; that her post office address is Whittier, Los Angeles, California.

Attest. (Two witnesses sign here always.)

- I. W. L. Hatton.
- 2. M. A. Chapman.

(Signed) Mary Phelan.

4th. (This jurat must always be filled in and signed by two witnesses.)

"Also personally appeared W. L. Hatton, residing at Whittier, California, and M. A. Chapman, residing at Whittier, California, persons whom I certify to be respectable and entitled to credit, and who, being by me duly sworn, say that they were present and saw Mary Phelan, the claimant, sign her name (or make her mark) to the foregoing declaration; that they have every reason to believe, from the appearance of said claimant and their acquaintance with her of I years and I years, respectively, that she is the identical person she represents herself to be; and that they have

(Testimony of Mrs. Mary Phelan.)
no interest, direct or indirect, in the prosecution of this claim. (Signed)

- I. W. L. HATTON.
- 2. W. A. CHAPMAN.

"Sworn to and subscribed before me this 12th day of May, A. D. 1908, and I do hereby certify that the contents of the foregoing declaration, etc., were fully made known and explained to the applicant and witnesses before swearing; that I have no interest, direct or indirect, in the prosecution of this claim. (Signed) S. W. Barton, official signature, notary public for the county of Los Angeles, state of California."

And below that the following:

"This application can be executed before a notary public, justice of the peace, or any officer authorized to administer oaths for general purposes."

"Proof of birth.

"State of California, County of Los Angeles-ss.

"In the matter of the claim for pension of Mary Phelan, of Los Nietos, Los Angeles county, California, widow of Thomas Phelan. Personally came before me a deputy county clerk in and for the aforesaid county and state, Joaquin Bot, and Mary Phelan, citizens of the county of Los Angeles, state of California, whose post office address is Los Nietos, Los Angeles county, California, and well known to me to be reputable and entitled to credit, and who, being duly sworn, declares in relation to aforesaid claim that the date of the births of the children of said soldier is as follows:

Daniel H., June 10, 1874;

Nellie R., September 28th, 1875;

John J., June 22, 1877;

Annie W., April 30th, 1880;

Thomas F., March 5, 1882;

Edward H., July 13th, 1886.

(Signed) Joaquin Bot, Catholic Rector, San Gabriel Mission. (Signed) Mary Phelan.

"Sworn to and subscribed before me this day by the above named affiant, and I certify that I read said affidavit to said affiant, and acquainted her with its contents before she executed the same.

"I further certify that I am in no wise interested in said claim, nor am I concerned in its prosecution.

"Witness my hand and official seal this 31 day of October, 1892. (Signed) Sam. Kutz, deputy county clerk.

"Note: This should be sworn to before a clerk of court, notary public or justice of the peace. If before a justice or notary, then clerk of county court must add his certificate of character hereon and not on a separate slip of paper."

"Department of the Interior Pension Bureau.

Washington, D. C., October 10, 1917.

I, G. M. Saltzgaber, Commissioner of Pensions, and custodian of the records of the Bureau of Pensions, do hereby certify that the attached eight pages are true photostat copies of three applications for pension made October 12, 1889; August 15, 1890, and May 12, 1908, respectively, and an affidavit made by Joaquin Bot and Mary Phelan on October 31, 1892, and filed by Mary Phelan as widow of Thomas Phelan, late of Co. F,

12th Vt. Mil. Inf., now on file in the Bureau of Pensions, and which claim was allowed by certificate number 697667.

In testimony whereof, I have hereunto subscribed my name and caused the seal of the Pension Bureau to be affixed, the day and year above written.

# G. M. SALTZGABER, Commissioner of Pensions."

- Q. By Mr. Lawson: I also want to call your attention, Mrs. Phelan, in Government's Exhibit No. 4, the first page, the entries of the births of your children, if that is not in your own handwriting?
  - A. I don't know.
  - Q. Is, or is that not, your handwriting?
- A. I don't know; I couldn't say; I don't remember writing that.
  - Q. Does it appear to be your handwriting?
  - A. No.
  - Q. You deny that is your handwriting?
- A. Well, I don't know; it is so long ago since I wrote it I can't say.
  - Q. Doesn't that look like your "M"?
  - A. I don't remember.
  - Q. Isn't that the same kind of "P" you make?
- A. I don't remember; I don't remember ever writing it.
  - Q. Isn't that the same kind of an "E" you make?
  - A. I don't know.
- Mr. Dockweiler: I object to that method of cross-examination.

The Court: I think, Mr. Lawson, you will have to show me some authorities on the subject. You can ask her if she made certain statements in that document.

- Q. By Mr. Lawson: I ask you again, Mrs. Phelan, if that is not your handwriting?
  - A. I don't remember; I can't say.

\* \* \* \* \* \* \*

The Court: Well, you may ask her if it is a photographic copy of her handwriting.

- Q. By Mr. Lawson: Is that a photographic copy of your handwriting?
  - A. I don't remember—

Mr. Dockweiler: Now, Mrs. Phelan, one minute. We object to the question as incompetent, irrelevant and immaterial and not proper cross-examination, and assumes a fact not proven.

The Court: The objection will be overruled.

Mr. Dockweiler: Exception.

- Q By Mr. Lawson: Is that your handwriting?
- A. I don't remember; I don't remember whether I wrote it.

The Court: That was not the question I gave you leave to ask.

- O. By Mr. Lawson: Is that a photographic copy of your handwriting?
  - A. I can't remember.

Mr. Dockweiler: One minute now. I renew my objection.

The Court: Well, the objection will be overruled to that.

Mr. Dockweiler: Exception.

After considerable discussion between court and counsel as to the admission of certain evidence, the court duly admonished the jury and took a recess for five minutes. At the expiration of said five minutes the court reconvened, and the jury being present, the proceedings of the trial were resumed.

### (Testimony of Claya Taylor for the Government.)

Claya Taylor, a witness called on behalf of the Government, out of order, having been first duly sworn, testified as follows:

### Direct Examination

By Mr. Lawson:

My name is Claya Taylor. I am a clerk to the United States Attorney. My duties in that office are stenography, and I partially have custody of the filing of papers, etc., and I send telegrams.

Q. Do you recall having sent that telegram (handing paper to the witness)?

Mr. Dockweiler: One minute. Let's see it. (Examining telegram.)

Mr. Dockweiler: What is the question, Mr. Reporter?

(Last question read by the reporter.)

Mr. Lawson: I will just withdraw that question, if Your Honor please.

Can you identify that telegram, Miss Taylor, as having been sent from the office of the United States Attorney?

A. It is a carbon of the telegram.

(Testimony of Claya Taylor.)

Mr. Dockweiler: One minute. What is that question?

(Last question read by the reporter.)

Mr. Dockweiler: We object to that question upon the ground that it is incompetent, irrelevant and immaterial.

The Court: The objection will be overruled.

Mr. Dockweiler: No foundation laid for it. Exception.

Q. By Mr. Lawson: Just answer the question.

A. I recognize it as a carbon copy of a telegram sent from the office.

Q. Do you remember that telegram having been sent?

Mr. Dockweiler: Same objection, Your Honor.

The Court: The objection will be overruled.

Mr. Dockweiler: Exception.

Mr. Lawson: It won't be necessary to answer that question. Just withdraw that question. It has already been identified. We offer this as Exhibit No. 5.

Mr. Dockweiler: We object to the offer upon the ground it is incompetent, irrelevant and immaterial and no foundation therefor.

The Court: The objection will be overruled.

Mr. Dockweiler: No sufficient foundation therefor has been laid, and not the best evidence.

The Court: Overruled.

Mr. Dockweiler: Exception.

Mr. Lawson (reading): "Western Union telegram. Charge Government rate. Los Angeles, California, 10-9-17.

(Testimony of Claya Taylor.) Attorney General,

Washington, D. C.

Send to special examiner Uline Los Angeles original papers proving age and birth Edward Phelan in pension application by Mary Phelan include any other evidence in pension files papers identified telegram October 9th from Saltzgiber trial October sixteenth Rush. O'Connor U S Atty."

Q. Can you identify this letter, Miss Taylor, as having been received in the office of the United States Attorney?

A. I can.

Mr. Dockweiler: Well now—is there an answer to that?

(Last answer read by the reporter.)

Mr. Dockweiler: Why, Your Honor, I would like to move to strike out the answer in order to enable me to get in the objection.

The Court: Did she answer this last question? It will be stricken out.

Mr. Dockweiler: Yes. We object to that question on the ground that the same is incompetent, irrelevant and immaterial.

The Court: The objection will be overruled.

Mr. Dockweiler: And leading and suggestive.

The Court: Overruled. Now, you may answer the question.

A. I do recognize it; yes.

Mr. Lawson: Offer this as Government's Exhibit No. 6.

(Testimony of Claya Taylor.)

Mr. Dockweiler: Let's see it. (Receiving and examining letter.) We object to the offer upon the ground that the same is incompetent, irrelevant and immaterial.

The Court: The objection will be overruled.

Mr. Dockweiler: Exception.

"Department of Justice, RLD-LP
Bureau of Investigation,
Washington, October 10, 1917.

"John R. O'Connor, Esquire, Assistant United States Attorney, Los Angeles, California.

"Dear Sir:

"Referring to your telegram to me of today, I enclose herewith copy of the baptismal and death records of the Cathedral of St. Vibiana, relative to the baptism of Edward Henry Phelan, copy of a deposition made by Mary Phelan on November 10, 1909, in connection with her claim for pension as widow of Thomas Phelan, and copy of three applications for pension made October 12, 1889, August 15, 1890, and May 12, 1908, by Mary Phelan, certified under the act of August 24, 1912, 37 Statutes at Large, page 498, section 3.

"The Commissioner of Pensions considered it impracticable to send the original papers. I believe, however, that the certified copies will serve your purpose equally well.

Very truly yours,

A. B. BIELASKI,
Chief."

(Enclosures) RLD"

Mrs. Mary Phelan, recalled.

Mr. Dockweiler: Before any questions are put, Your Honor, I wish Your Honor would personally read this letter.

The Court: That is the one just admitted?

Mr. Dockweiler: Yes. The statements therein contained are hearsay, Your Honor. That is not a statement of the Commissioner of Patents.

Mr. Palmer: I dont' know what the Commissioner of Patents would have to do with it.

Mr. Dockweiler: Or Pensions, rather. And furthermore, there is no statement that the papers cannot be sent or transmitted.

Mr. Palmer: There is a statement that they will not be, however.

The Court: Well, the ruling will stand concerning the letter. Of course, the court must take judicial notice that Bielaski is the chief of the Pension Department, and his superior, of course, is the Commissioner of Pensions. Bielaski is the man who should have charge of these things and send them out, but he should do it only with permission of his chief or senior officer. Let the ruling stand.

Mr. Dockweiler: Exception.

Mr. Lawson: Cross-examine—or, that is all, Mrs. Phelan.

The Court: Is that all of this witness?

Mr. Dockweiler: No, just a minute, Your Honor. That is all for the time being, Your Honor. Mrs. Martinez.

70

## (Testimony of Mrs. Maria Jesus de Martinez on Behalf of Defendant.)

Mrs. Maria Jesus de Martinez, a witness called on behalf of defendant, having been first duly sworn, through the interpreter, Ralph Dominguez, testified as follows:

### Direct Examination

By Mr. Dockweiler:

My name is Maria Jesus de Martinez, and I reside at Los Nietos, and have resided in Los Angeles county since I was three years old. I am acquainted with the defendant, Edward Phelan, and have been since he was born. I know his mother, Mary Phelan, and have known her since we were first married together, since we were young girls.

I was present at the birth of Edward Phelan. I have four children of my own, two boys and two girls. There was also present at the birth of Edward Phelan a lady that helped her; they called her Guara. (By the interpreter.) It means blondy. She has been dead over twenty years. Aside from the midwife, Mrs. Phelan and myself, there was no one present at the defendant's birth. I don't remember the month that Edward was born. I had a child born a comparatively short period before Edward was born. Gaspar was born nearest Edward. I don't know what year he was born, but he is going on thirty-three years. Gaspar was born on the 6th day of January. Gaspar was born before Edward; he is older. I think he, my boy, is a year and a month or two older than Edward. My son was born January 6th, and he is about thirtythree years of age. My boy is about a year and two

(Testimony of Mrs. Maria Jesus de Martinez.) months older than Edward, one year and a month or two, more or less.

### Cross-Examination

By Mr. Lawson:

I have four children. I cannot give the names and birthdays of each. I don't remember as to the dates. I know the names of them, not the years, but I can tell the months by having them in my head. I don't remember the year Gaspar was born in, but he is going to be thirty-three next January, because he told me so, and I have it on a memorandum. My boys told me their ages. Gaspar told me his, but I did not pay any attention what year. Gaspar told me when he was born. Each of my children did not tell me when they were born, only Gaspar. I know that he was born January 6th, I know it in my head, because he is the smallest of the family. I can't tell you when Gaspar told me he was born January 6th, but it was since I was subpoenaed in this case. It was within the last year, within the last half year, more or less. I don't know whether it was within the last three months, but it was not since I was subpoenaed in this case. Gaspar and Edward have been for many years under the impression that they were about the same age. A long time ago Gaspar took a memorandum of it. He did it for many years. The father used to mark it down as they were born. I was born the 4th of July, 1854. My father used to call me Fourth of July. I have a family record of the births of my children, but I have it in my house. It is on a piece of paper. I have had it thirty years and over. It is in a geography that is about as old as I am.

## (Testimony of H. E. Collins on Behalf of the Defendant.)

H. E. Collins, a witness called on behalf of defendant, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Dockweiler:

My name is H. E. Collins, and I reside at Riveria. I have resided in Los Angeles county about twenty-eight years and am a horticulturist and manufacturer of fertilizers. I am acquainted with the defendant, Edward Henry Phelan, and have known him possibly eighteen years. I am acquainted with his reputation in the community where he lives for peace, quiet, truth and veracity, and it is most excellent.

## (Testimony of T. L. Gooch on Behalf of the Defendant.)

T. L. Gooch, a witness called on behalf of defendant, having been first duly sworn, testified as follows:

### Direct Examination

By Mr. Dockweiler:

My name is T. L. Gooch, and I reside near Riveria, and have resided there for forty-seven years. I know Edward H. Phelan, and have known him all his life. I am a horticulturist and have been engaged in that business thirty-five or forty years. I am acquainted with the reputation of the defendant for truth and veracity and peace and quiet in the neighborhood and community in which he lives, and that reputation is good.

# (Testimony of Max Schwed on Behalf of the Defendant.)

Max Schwed, a witness called on behalf of the defendant, having been first duly sworn, testified as follows:

### Direct Examination

By Mr. Dockweiler:

My name is Max Schwed, and I reside in this city and have resided in Los Angeles county for forty-eight years. I am retired now but used to be in the general merchandise business at Los Nietos, which is situated about a mile and a half from Riveria. It is in the same section. I am acquainted with the defendant and have known him since childhood. I know the reputation of the defendant in the community where he lives for truth, veracity, and peace and quiet, and that reputation is good.

### Cross-Examination

By Mr. Lawson:

I am retired. I formerly ran a general merchandise store at Los Nietos. We used to keep everything, dry goods, groceries, and everything combined. I started the store in 1872. I also kept liquors and ran a saloon combined with the store.

## (Testimony of Mrs. Harriett W. R. Strong on Behalf of Defendant.)

Mrs. Harriett W. R. Strong, a witness called on behalf of the defendant, having been first duly sworn, testified as follows:

### Direct Examination

By Mr. Dockweiler:

My name is Harriett W. R. Strong, and I reside near Whittier, in Los Angeles county, and have resided there continuously since 1888. I arrived in California earlier than that, in 1878. I am acquainted with the defendant. I know him as a member of the family that has grown up there. I have known him since 1888 and have known the entire family since 1888. I am acquainted with the reputation of the defendant, Edward Phelan, in the community in which he lives for truth and veracity and peace and quiet, and that reputation is good.

## (Testimony of A. H. Gregg on Behalf of the Defendant.)

A. H. Gregg, a witness called on behalf of the defendant, having been first duly sworn, testified as follows:

### Direct Examination

By Mr. Dockweiler:

I reside near Whittier and have since 1881. I am a rancher and in the land business. I am acquainted with the defendant and have known him since he was a little child. I know the reputation of the defendant for truth and veracity and peace and quiet in the community in which he lives, and that reputation is very good.

# (Testimony of George F. Prince on Behalf of the Defendant.)

George F. Prince, a witness called on behalf of the defendant, having been first duly sworn, testified as follows:

### Direct Examination

By Mr. Dockweiler:

My name is George F. Prince, and I have resided in Los Angeles county for thirty years. I am a vegetable buyer for the California Vegetable Union. I am acquainted with the defendant, Edward H. Phelan, and have known him intimately for seven or eight years. I am acquainted with his reputation in the community in which he lives for truth and veracity and peace and quiet, and that reputation is good.

## (Testimony of C. Sorenson on Behalf of the Defendant.)

C. Sorenson, a witness called on behalf of the defendant, having been first duly sworn, testified as follows:

### Direct Examination

By Mr. Dockweiler:

My name is C. Sorenson. I am seventy-seven years old and reside about one mile west of Whittier. I have resided there permanently for forty-one years, and in Los Angeles county for fifty-one years. I am acquainted with the defendant, Edward Phelan, and have been since his childhood. I am acquainted with the defendant's reputation in the community in which he lives for truth and veracity and peace and quiet, and that reputation is very good.

## (Testimony of O. M. Souden on Behalf of the Defendant.)

O. M. Souden, a witness called on behalf of the defendant, having been first duly sworn, testified as follows:

#### Direct Examination

By Mr. Dockweiler:

I am engaged in the banking business and have been for nearly eighteen years, in Los Angeles and in Whittier. I am acquainted with the defendant, Edward H. Phelan, and have been for about seventeen years. I am acquainted with his reputation in the community in which he resides for truth and veracity and peace and quiet, and that reputation is good.

Thereupon it was stipulated between Mr. Dock-weiler and counsel representing the Government, as a matter of evidence, that the conscription act and registration act was adopted and enacted into law and approved May 18th, 1917, and that the proclamation of the President was issued under that act and pursuant to that act on the same date.

Whereupon Mr. Palmer presented the opening argument on behalf of the Government, at the conclusion of which the court, after duly admonishing the jury, took an adjournment until ten o'clock a. m. October 19th, A. D. 1917.

The court reconvened at the hour of ten o'clock a. m. on Monday, October 19th, 1917, and the jury being present, the proceedings of the trial were resumed.

Whereupon, Mr. Dockweiler presented his argument on behalf of defendant.

"The first witness called by the prosecution was a gentleman by the name of George T. Jeffries, deputy county recorder. He testified to nothing that is before you."

At the conclusion of Mr. Dockweiler's argument the court, after admonishing the jury, took a recess of five minutes, at the conclusion of which time the court reconvened, and the jury being present, the proceedings of the trial were resumed.

Whereupon Mr. Lawson presented the closing argument on behalf of the Government, and among other things, argued and stated to the jury as follows (quoting from closing argument of Mr. Lawson):

"Then Mr. Dockweiler said: 'Let us go bravely through the evidence.' And I want to say, Mr. Dockweiler, that you surely have valor; and I pay him tribute for the braveness with which he went to the evidence. And it did require a courageous man, gentlemen of the jury, to go through all of that evidence. And he did the best he could; he did as well as anybody could do, and he is a valorous man. He said certain witnesses testified to nothing. Of course. Why? Of course, because he would not let them. That is why they did not testify. Why the suppression of the facts, gentlemen of the jury? Why didn't they want these facts to get to you? And then he gets up and says they testified to nothing. It is only because of the power of counsel—"

"Mr. Dockweiler: May it please the Court, I now assign as error the remarks just made by the prose-

cuting counsel in commenting upon my effort, representing the defendant in this case, to keep out evidence that the court held was improper and thereby appealing to the prejudice and other instincts of the jury."

"Mr. Lawson: That remark-"

"Mr. Dockweiler: I assign it as error."

"The Court: Proceed with the argument."

"Mr. Lawson: That remark was referred to by Mr. Dockweiler. You said they didn't testify. And again I repeat, the reason they did not testify was because Mr. Dockweiler would not let them testify. Evidently you can draw from that only one conclusion that those facts were to be withheld from you—"

"Mr. Dockweiler: If the Court please, I want to assign the remarks just made by counsel since my first objection, as error, and I urge and assign them as error."

"The Court: The jury will not consider the remarks of the United States attorney, coming to a conclusion from this evidence. The jury have no right to consider any evidence that was excluded."

## (Instructions Requested by Defendant and Refused.)

Thereupon the defendant requested the court to give to the jury the instructions hereinafter immediately set out, which request was by the court refused as to each and every one of said instructions, to each and every one of which refusals the defendant duly excepted. You are instructed that you cannot presume, conjecture, guess or arrive at any conclusion as to the age of the defendant, Edward H. Phelan, from the mere fact that he was baptized on the 8th day of August, 1886.

You are instructed that the law presumes the defendant innocent of the crime charged in the indictment and innocent of any crime whatsoever, and you are instructed that the presumption of innocence follows him throughout the trial in this case, and in your deliberations as to the guilt or innocence of this defendant you must take into consideration said presumption of innocence as a matter of evidence.

You are instructed that on June 4th, 1886, and at the time Thomas Phelan executed the declaration of homestead on the property near Whittier, where he was then residing, the law of the state of California did not require that he insert in such declaration of homestead the names of his children, the number of his children, or the ages of his children.

You are instructed that the law of the state of California has at no time required one declaring a homestead on property to insert in the declaration of homestead the names, ages or number of his children, or the dates of their birth.

The court instructs the jury that the law did not require a declaration of homestead to set forth the number of children, or their ages, possessed by the party making such declaration of homestead.

The law in a criminal case clothes the defendant with the presumption of innocence, and when proof tends to overthrow this presumption, and to fix upon

the defendant the presumption of guilt, the latter is permitted to support the original presumption of innocence by proof of good character. Such good character, when proven, is a circumstance tending in a greater or lesser degree to establish his innocence. It is of value not only in doubtful cases, but also when the testimony tends very strongly to establish the guilt of the accused. When proven, it is a fact in the case, and it is not to be put aside by the jury in order to ascertain that the other facts and circumstances considered in themselves do not establish the defendant's guilt beyond a reasonable doubt, but such good character, if proven, should be considered by the jury in connection with all of the testimony in the case, and not independently thereof, and the guilt or innocence of the defendant determined from all the testimony in the case, and such good character, if proven, should be weighed as any other fact established, and may, if proven, in itself be sufficient to raise a reasonable doubt as to the defendant's guilt in the minds of the jury.

The law in a criminal case clothes the defendant with the presumption of innocence, and when proof tends to overthrow this presumption, and to fix upon the defendant the presumption of guilt, the latter is permitted to support the original presumption of innocence by proof of good character. Such good character, when proven, is a circumstance tending in a greater or lesser degree to establish his innocence. It is of value not only in doubtful cases, but also when the testimony tends very strongly to establish the guilt of the accused. When proven, it is a fact in the case,

and it is not to be put aside by the jury in order to ascertain that the other facts and circumstances considered in themselves do not establish the defendant's guilt beyond a reasonable doubt, but such good character, if proven, should be considered by the jury in connection with all of the testimony in the case, and not independently thereof, and the guilt or innocence of the defendant determined from all the testimony in the case, and such good character, if proven, should be weighed as any other fact established, and may, if proven, in itself be sufficient to raise a reasonable doubt as to the defendant's guilt in the minds of the jury. If the jury find the evidence conflicting and doubtful as to the defendant's guilt, the importance which the jury are authorized to give to the evidence of good character is thereby increased.

In connection with what I have said on this subject you are further instructed that the evidence in this case stands undisputed that the defendant is a person of good character and enjoys a reputation in the community where he lives for truth, honesty and veracity. In addition to the evidence offered upon the subject, it was conceded by the council for the government that he is a person of good moral character and enjoys a good reputation in the community where he lives for truth, honesty and veracity.

You are instructed that if the defendant was over the age of 31 years on June 5th, 1917, or if he had reason to believe and did believe that he was over the age of 31 years on the said 5th day of June, 1917, you must acquit him.

You cannot convict the defendant of the crime

charged in the indictment if you believe from the evidence that he had reason to believe or did believe that he was not required to present himself for and submit to registration under and pursuant to the Act of Congress of May 18th, 1917.

You are instructed that the indictment charges, in substance, that Edward H. Phelan, being a person between the ages of twenty-one and thirty, to-wit, a person who had attained his twenty-first birthday and who had not attained his thirty-first birthday on the 5th day of June, 1917, and being a person required to register under and pursuant to the Act of Congress approved May 18th, 1917, entitled "An Act to Authorize the President to Increase Temporarily the Military Establishment of the United States," unlawfully did wilfully fail and refuse to present himself at the registration place in Los Nietos precinct, Los Angeles county, between 7 a. m. and 9 p. m. on said 5th day of June, 1917, and to submit himself for registration as in said Act provided; and in this respect I charge you that before you can convict the defendant of wilfully failing to present himself and submit to registration pursuant to said Act of Congress, you must believe from the evidence beyond a reasonable doubt that the said defendant, Edward H. Phelan, had not attained his thirty-first birthday on the 5th day of June, 1917, and that he knew said fact and fully understood said fact, and that, knowing and understanding that he had not attained his thirty-first birthday, and knowing and understanding that he was required to register pursuant to said Act of Congress, that he did wilfully fail and refuse to present himself for and

submit to registration as provided by said Act of Congress.

If, on the other hand, you believe from the evidence that the said Edward H. Phelan believed or had reason to believe that he had attained his thirty-first birthday on the said 5th day of June, 1917, and that he did not understand and believe that he was required to register under and pursuant to said Act of Congress on the said 5th day of June, 1917, then you must acquit him.

If you believe from the evidence that the defendant, on and throughout the 5th day of June, 1917, had reason to believe and did believe that he arrived at the age of 31 years of age on the 13th day of March, 1917, and that he had reason to believe and did actually believe, on and throughout the 5th day of June, 1917, that he was over 31 years of age, then I instruct you that you must acquit him.

I instruct you that the law presumes that the defendant in this case is innocent of the crime charged in the indictment, and that that presumption follows him throughout the trial, and in determining the innocence or guilt of defendant it is your duty to take into consideration the presumption of his innocence as a matter of evidence.

The fact that the defendant in this case has been indicted and crime charged against him does not raise any presumption in any way or manner whatsoever that he is guilty of the crime charged, or of any crime whatsoever, and in that regard you are instructed that the law presumes that the defendant is innocent of the crime charged in the indictment, and that said

presumption follows him throughout the trial of this case.

It is incumbent upon the government to prove beyond a reasonable doubt that the defendant is guilty of the crime charged in the indictment, and if after you have weighed the evidence there is a reasonable doubt in your minds as to the guilt of the defendant, it is your duty to acquit him.

If after weighing and considering the evidence according to the rules given you by the court for your guidance, there is any reasonable doubt in your minds as to whether the defendant is guilty or innocent of the crime charged in the indictment, it is your duty to render a verdict acquitting him of said crime.

You cannot convict the defendant of the crime charged in the indictment unless you are convinced by the evidence beyond a reasonable doubt that he is guilty of such crime.

You are not bound to decide in conformity with the declarations of any number of witnesses which do not produce conviction upon your minds against a less number or against a presumption or other evidence satisfying to your minds; and in this connection I instruct you that a witness false in one part of his or her testimony is to be distrusted in others.

You are instructed that in determining the weight to be given to the testimony of a witness you will take into consideration the intelligence of the witness, the witness' bias or prejudice, if any, his or her manner on the witness stand, his or her apparent fairness or want of fairness, his or her means of observation and knowledge, and all matters, facts and circumstances shown on the trial, including any evidence offered tending to impeach the reputation of the witness for truth and veracity in the neighborhood where he or she resides, bearing upon the question of the weight to be given to his or her testimony; and give to the testimony of each and every witness such weight as to you it may seem fairly entitled to.

You are the sole judges of the weight of the evidence and the credibility of the witnesses, and in determining the same, you may consider the interest, bias or prejudice of a witness, if any, and manner in which the witness testifies on the stand, his or her apparent fairness or want of fairness, his or her means of observation and knowledge, and all matters, facts and circumstances shown on the trial bearing upon the question of the weight to be given to his or her testimony.

You are instructed that the indictment in this case charges that Edward H. Phelan on June 5th, 1917, was a male person between the ages of twenty-one and thirty; and in this respect I charge you that the undisputed evidence in this case shows that Edward H. Phelan was not a person between the ages of twenty-one and thirty on June 5th, 1917, but that he was over thirty years of age on June 5th, 1917, and you are therefore instructed and directed to return a verdict acquitting the defendant of the crime charged in the indictment.

You are instructed that the government has wholly failed to prove that the defendant is guilty of the crime charged in the indictment, and you are therefore instructed to return a verdict acquitting him. You are instructed to return a verdict acquitting the defendant.

Before the defendant can be convicted of the crime charged in the indictment you must be satisfied from the evidence beyond a reasonable doubt that the said defendant did on the 5th day of June, 1917, know that he was over the age of 31 years of age and that knowing said fact that he willfully failed to register; therefore if you believe from the evidence that he did on said day have reason to believe, and did believe, that he was over the age of 31 years, or if you believe from the evidence that he was over the age of 31 years, then you must acquit him.

Before you can convict the defendant of the crime charged in the indictment you must not only believe that he had not attained the age of 31 years on the 5th day of June, 1917, but you must also believe from the evidence beyond a reasonable doubt that the said defendant on the said 5th day of June, 1917, knew or believed that he had not attained the age of 31 years, and that knowing said fact that he willfully failed to register for military service and to submit to registration as required by law.

The word "willful" implies an intent and purpose on the part of a person to do an act, and therefore I charge you that before the defendant can be convicted of the crime charged in the indictment you must believe from the evidence beyond a reasonable doubt that he was a person over the age of twenty-one years and who had not attained his thirty-first birthday on or prior to the 5th day of June, 1917, and that, fully knowing and understanding said facts and fully knowing and understanding that he was required to present himself for and submit to registration at the Los Nietos precinct, in Los Angeles county, California, on said 5th day of June, 1917, he did willfully fail and refuse so to do.

It is incumbent upon the government in this case not only to prove beyond a reasonable doubt that the defendant failed to present himself for and to submit to registration under the Act of Congress approved May 18, 1917, on June 5th, 1917, but the government must go further and prove beyond a reasonable doubt that the said defendant, knowing that he had not attained the age of 31 years on the 5th day of June, 1917, and knowing that he was required to submit himself for registration and to register pursuant to said Act of Congress at the Los Nietos precinct, in Los Angeles county, between 7 a. m. and 9 p. m. on said 5th day of June, 1917, did willfully fail to present himself for and submit to registration on June 5th, 1917.

(INSTRUCTIONS GIVEN BY COURT TO JURY.)

The court thereupon gave and read to the jury the instructions hereinafter immediately set forth:

The offense, gentlemen, with which this defendant is charged is that of wilfully failing and refusing to submit himself for registration under the act providing for the temporary increase of the military forces of the United States government, in that the said Edward Phelan, on June 5th, 1917, within this district, being a male person between the ages of twenty-one and thirty-one, to-wit,—he had attained his twenty-first

birthday, but who had not on that date, and had not before that, attained his thirty-first birthday, and as such person was then and there required by the proclamation of the President of the United States to present and submit himself for registration within the hours provided by law, did then and there unlawfully and wilfully fail and refuse to present himself for registration, and to submit to registration as in such act and in said proclamation provided, he then and there not being an officer or enlisted man of the regular army, and not being in any wise engaged in military service.

This indictment on file and which I have just read is, and is to be considered as, of course, a mere charge or accusation against the defendant, and is not, of itself, any evidence of the defendant's guilt, and no juror in this case should permit himself to be, to any extent, influenced against the defendant because or on account of such indictment on file. It is the duty of the jury to decide whether the defendant is guilty or not guilty of the offense charged after the consideration of all the evidence submitted in the case.

It is not for you to consider the penalty prescribed for the punishment of the offense at all. If you are aware of the penalty prescribed by law, it is your duty to disregard that knowledge; in other words, your sole duty, gentlemen, is to decide whether the defendant is guilty or not guilty of what he is charged with. The question of punishment is left wholly to the court, except as the law circumscribes its power.

You are instructed, gentlemen, that you are the exclusive judges of the credibility of the witnesses

whose testimony has been admitted in evidence herein, and of the effect and value of such evidence. Your power in this regard, however, is not arbitrary, but is to be exercised with legal discretion and in subordination to the rules of evidence.

It is the province of the court, under the law, to state to you the rules of law applicable to the case, and you, in your deliberations, will be guided by those rules so stated.

It is your duty, unaided by the court, to pass upon and decide all questions of fact. Every witness is presumed to speak the truth, but this presumption may be repelled by the manner in which he or she testifies, by his or her appearance upon the stand, by the character of his or her testimony, or by the giving of false or perjured testimony by him or her, or by evidence affecting his or her character for truth, honesty or integrity, or by his or her motives, interest, or bias, or by contradictory evidence.

A witness may be impeached by the party against whom he or she was called, by contradictory evidence, by evidence that he or she has made, at other times, statements inconsistent with his or her present testimony, and by evidence that his or her general reputation for truth, honesty and integrity is bad.

If you believe that any witness has been impeached, or that the presumption of truthfulness attaching to the testimony of such witness has been repelled, then you are to give the testimony of such witness such credibility, if any, as you may think it entitled to. You are not bound to decide in conformity with the declarations of any number of witnesses which do not produce

conviction in your minds against a less number or against a presumption or other evidence satisfying your minds.

The law permits the defendant, at his own request, to testify in his own behalf. The defendant here has availed himself of this privilege and his testimony is to be treated like the testimony of any other witness,—that is, it is for you to say, remembering his testimony, his cross-examination, his demeanor and attitude on the witness stand, and during the trial, and everything else in the case, whether or not he told the truth. The deep personal interest which he may have in the result of the suit should be considered by the jury in weighing his evidence and in determining how far, or to what extent, if at all, it is worthy of credit.

If any witnesses are shown knowingly to have testified falsely on this trial, touching matorial matters here involved, the jury are at liberty to reject the whole or any part of their testimony.

In civil cases, gentlemen, the affirmative of the issue must be proven, and when that is contradicted the decision must be in accordance with the preponderance of the evidence; but in criminal cases guilt must be established beyond a reasonable doubt, and the burden of establishing such guilt rests upon the government. The law does not require of the defendant that he prove himself innocent, but the law requires the government to prove the defendant guilty in the manner and form as charged in the indictment beyond reasonable doubt, and unless the government has done so the jury should acquit.

Before a verdict of guilty can be rendered, each

member of the jury must be able to say, in answer to his own individual conscience, that he, in his mind, has arrived at a fixed opinion based upon the law and the evidence in the case, and upon nothing else, that the defendant here in guilty.

There are two classes of evidence recognized and admitted in courts of justice, upon either of which juries may lawfully find an accused guilty of crime; one is direct or positive testimony of an eve-witness to the commission of the crime, the other is testimony in proof of a chain of circumstances pointing sufficiently strong to the commission of the crime by the defendant, and which is known as circumstantial evidence. Such evidence may consist of admissions by the defendant, plans laid for the commission of the crime; in short, any acts, declarations, or circumstances admitted in evidence, tending to connect the defendant with the commission of the crime. Where the evidence is entirely circumstantial, yet is not only consistent with the guilt of the defendant, but inconsistent with any other rational conclusion, the law makes it the duty of the jury to convict.

The good character of a person accused of crime, when proven as a fact in the case, is a circumstance tending, in a greater or less degree, to establish his innocence. It must be considered in connection with all the other facts and circumstances of the case, and may be sufficient in itself to raise a reasonable doubt as to the defendant's guilt; but if, after a full consideration of the evidence adduced, the jury believes the defendant to be guilty of the crime charged, they

should so find, notwithstanding proof of good character.

The law presumes a defendant charged with crime innocent until proven guilty beyond a reasonable doubt. If you can reconcile the evidence before you upon any reasonable hypothesis consistent with the defendant's innocence, you are to do so, and, in that case, find the defendant not guilty.

You are further instructed that you cannot find the defendant guilty unless, from all the evidence, you believe him guilty, beyond a reasonable doubt.

A reasonable doubt is a doubt based on reason, and which is reasonable in view of all the evidence, and if, after an impartial comparison and consideration of all the evidence, or from want of sufficient evidence on behalf of the government to convince you of the truth of the charge, you can candidly say you are not satisfied of the defendant's guilt, then you have a reasonable doubt, but if, after such impartial comparison and consideration of all the evidence, you can truthfully say that you have an abiding conviction of the defendant's guilt, such as you would be willing to act upon in the more weighty and important matters relating to your own affairs, then you have no reasonable doubt. By such reasonable doubt you are not to understand that all doubt is to be excluded, for it is impossible in the determination of these questions to be absolutely certain. You are required to decide the question submitted to you upon the strong probabilities of the case. and in order to justify a conviction the probabilities must be so strong as, not to exclude all doubt or possibility of error, but as to exclude reasonable doubt.

When, weighing all the evidence, you have an abiding conviction and belief that the defendant is guilty, it is your duty to convict. No sympathy justifies you in seeking for doubt by any strained or unreasonable consideration or interpretation of the evidence or facts. The law of the United States, as declared by the Congress thereof, gentlemen, among other things, in the Act of Congress approved May 18th, 1917, provided for the temporary increase of the military forces of the United States occasioned because of war with Germany—

"That all male persons between the ages of twentyone and thirty, both inclusive, shall be expected to register in accordance with regulations to be prescribed by the President, and upon a proclamation by the President or other public notice given by him or by his direction, stating the time and place of such registration, it shall be the duty of all persons of the designated ages, except officers and enlisted men of the regular army, or navy, and the national guard and naval militia within the boundaries of the United States, to present themselves for and submit to registration under the provisions of this act, and every such person shall be deemed to have notice of the requirements of this act upon the publication of said proclamation or other notice, as aforesaid, given by the President or by his direction, and any person who shall wilfully fail or refuse to present himself for registration or to submit himself thereto, as herein provided, shall be guilty of a misdemeanor."

The question in this case, gentlemen, is, primarily,—what was the age of the defendant, Phelan, on regis-

tration day, June 5th, 1917? If, on that day, he had attained his thirty-first birthday, then he was not liable to that draft, and not required to present himself for registration, and should be acquitted by you. If, however, you find and believe that the defendant, Phelan, was not thirty-one years of age on said registration day, that is, if he was born subsequently to June 5. 1886, and in good faith believed that he was born subsequent to that date, and you believe that he wilfully refused to register, then you should convict him. It might be that though he was, in truth and in fact, under thirty-one years, if he in good faith and with sufficient reason, believed himself to be over thirty-one years of age, in such event I charge you he could not be held wilfully to have neglected to register. element of wilfulness in addition to the mere question of age as above referred to must be present in order to justify a conviction.

The word willful implies an intent and purpose on the part of a person to do or not to do an act.

In this case the defendant admits that he knew that persons over twenty-one years of age—who had not attained their thirty-first birthdays,—were required to register, for he says that he took a person to the registration place for the purpose of registration. Now, if the defendant had not, in fact, reached his thirty-first birthday, and if, in fact, he knew or believed that he had not reached his thirty-first birthday, being over twenty-one years of age, the element of willfulness would be established.

This case, gentlemen, like all cases triable in courts of justice, should be determined by you upon the evidence before you, and upon that alone, subject to the rules of law laid down for your guidance by the court, and no juror, acting conscientiously, can base his verdict upon any other consideration. In this connection you are instructed juries are empanel for the purpose of agreeing upon a verdict, if they can conscientiously do so. It is true that each juror must decide the matter for himself, yet he should do so only after the consideration of the case with his fellow jurors. He should not hesitate to sacrific his views or opinions of the case when convinced that they are erroneous, even if in so doing he defer to the views or opinions of others.

In the District Court of the United States, in and for the Southern District of California, Southern Division.

THE UNITED STATES OF AMERICA.

Plaintiff,

VS.

EDWARD H. PHELAN,

Defendant.

No. 1299 Criminal.

We, the jury in the above-entitled cause, find the defendant, Edward H. Phelan, guilty as charged in the indictment.

Los Angeles, California, October 19th, 1917. JOHN F. SLAUGHTER,

Foreman.

In the District Court of the United States, in and for the Southern District of California, Southern Division.

No. 1299 Criminal.
THE UNITED STATES OF AMERICA,

Plaintiff,

VS.

EDWARD H. PHELAN,

Defendant.

### Motion for a New Trial.

Comes now Edward H. Phelan, and moves said Honorable Court to vacate and set aside the verdict of guilty herein rendered and recorded on the 19th day of October, 1917, and to grant said defendant a new trial herein, for the following reasons:

- (1) That said verdict is contrary to law.
- (2) That said verdict is contrary to the evidence.
- (3) That the said court misdirected the said jury in matters of law.
- (4) That the said court erred in refusing to give to the jury certain charges specifically asked for by the defendant, and which refusal said defendant at the time duly excepted.
- (5) That the said court has erred in the decision of questions of law arising during the course of the trial.
- (6) That the said court erred in admitting in evidence against objections of defendant Plaintiff's Exhibits marked, respectively, United States Exhibits 3, 4, 5 and 6, and each of them, and to which action of the court defendant duly excepted in each instance.

- (7) That there were other errors of law appearing upon the trial prejudicial to the defendant.
- (8) Misconduct on the part of counsel for the Government, which prevented defendant from having a fair and impartial trial, and to which defendant duly excepted.
- (9) Misconduct on the part of counsel for the Government in calling the attention of the jury to the action of the counsel for the defendant throughout the proceedings of the trial in objecting to the admission in evidence of certain testimony, and which defendant's counsel succeeded in having excluded from evidence, and in his comments thereon, and which misconduct prevented defendant from having a fair and impartial trial, and to which defendant duly excepted.

The said motion will be made and based upon the minutes of the court, including the notes of the evidence taken by the judge who tried said cause, as well as all the evidence given and received in the case and transcribed by the reporter, and all proceedings in the case so transcribed, which also included the whole testimony in the case and all the rulings made therein and excepted to by the defendant, and the address of counsel for the Government to the jury, and the affidavit of R. T. Walters, filed herein, and all other proceedings, and also upon all the pleadings, proceedings, records, exhibits, instructions and papers on file in said action with the clerk in the clerk's office of said court.

Dated this 22nd day of October, 1917.

ISIDORE B. DOCKWEILER,

Attorney for Said Defendant.

(Endorsed): Filed Oct. 22, 1917. Wm. M. Van Dyke, clerk; by Geo. W. Fenimore, deputy. Service of the within motion is hereby admitted this 22nd day of October, 1917. W. F. Palmer, Asst. U. S. Atty., attorney for plaintiff.

In the District Court of the United States, in and for the Southern District of California, Southern Division.

No. 1299 Criminal.
THE UNITED STATES OF AMERICA,

Plaintiff,

VS.

EDWARD H. PHELAN,

Defendant.

### Affidavit of R. T. Walters.

United States of America, State of California, County of Los Angeles—ss.

R. T. Walters, being first duly sworn, deposes and says, that he is an attorney-at-law, duly licensed to practice in all the courts of the state of California and in the above entitled court; that he resides at the city of Whittier, in the county of Los Angeles, state of California, in the above named district; that he is not a party to or in any way interested in the above entitled action. That he was in the Federal Building at Los Angeles, California, wherein the court room in which the above entitled case was tried is located, on Friday afternoon, October 19th, 1917, and that after the jury had rendered their verdict in the above entitled action and were discharged, several of

the jurymen who had sat as jurymen on the trial of the above entitled case went down in the same elevator that this affiant did, and that the said case was discussed among said jurors and this affiant. That one of the said jurymen, whose name affiant does not now know, but whom affiant can identify, left said elevator in the said Federal Building with affiant and walked with affiant from the said Federal Building across Temple street to the southwest corner of Temple street and Spring street, on which corner the International Bank Building is located; that while going from the said Federal Building to the said corner and for a short time thereafter this affiant and the said jurymen discussed the above entitled case and that the said jurymen stated to this affiant, in substance, as follows, to-wit:

That Mr. Dockweiler, the attorney for the defendant, objected strenuously to the introduction of certain evidence offered by the Government; that he did not know why the evidence should not have gone in, unless it would have injured the defendant, and that that fact, as much as any evidence offered in the case, was the reason for his decision in finding the defendant guilty.

R. T. WALTERS.

Subscribed and sworn to before me this 22nd day of October, 1917.

# D. A. HAMMOCK,

U. S. Commissioner.

(Endorsed): Filed October 22nd, 1917. Wm. M. Van Dyke, clerk; by Geo. W. Fenimore, deputy. Service of the within affidavit is hereby admitted this 22nd

day of October, 1917. W. F. Palmer, Asst. U. S. Atty., attorney for plaintiff.

At a stated term, to-wit: the July Term, A. D. 1917, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the court room thereof, in the city of Los Angeles, on Monday, the 22nd day of October, in the year of our Lord one thousand nine hundred and seventeen.

Present: The Honorable Oscar A. Trippet, District Judge.

THE UNITED STATES OF AMERICA,

Plaintiff,

VS.

EDWARD H. PHELAN,

Defendant.

No. 1299 Criminal, S. D.

This cause coming on this day for the sentence of defendant, Gordon Lawson, Esq., and Wm. F. Palmer, Esq., Assistant U. S. attorneys, appearing as counsel for the United States; defendant being present on bail, with his counsel, Isidore B. Dockweiler, Esquire; and said counsel for defendant having moved the court for a continuance of this cause for sentence, and said motion for continuance having been argued, in support thereof, by Isidore B. Dockweiler, of counsel for defendant, and in opposition thereto by Wm. F. Palmer, Esq., assistant U. S. attorney, of counsel for the United States: It is by the court ordered that defendant's said motion for a continuance of this case be, and the same hereby is denied; and defendant's motion for a

new trial, and an affidavit in support thereof, having been filed in open court; and said motion for a new trial having been argued, in support thereof, by Isidore B. Dockweiler, Esq., of counsel for defendant, and in opposition thereto by Gordon Lawson, Esq., and Wm. F. Palmer, Esq., assistant U. S. attorneys, of counsel for the United States, and in support thereof in reply by Isidore B, Dockweiler, Esq., of counsel for defendant: It is ordered that the defendant's motion for a new trial herein be, and the same hereby is denied, to which ruling of the court, on motion of defendant and by direction of the court, exceptions are hereby entered on behalf of said defendant; and, on motion of Isidore B. Dockweiler, Esq., of counsel for defendant, it is ordered that said defendant be, and he hereby is granted ten (10) days within which to prepare, serve and file his proposed bill of exceptions herein; whereupon the court pronounces sentence upon said defendant for the offense of which he now stands convicted. namely, the offense of failure to register in violation of the Act of Congress of May 18th, 1917, and the proclamation of the President of the same date, as follows, to-wit: The judgment of the court is, that the defendant, Edward H. Phelan, be imprisoned for the term of twelve (12) months in the county jail of Los Angeles county, California, and that he thereupon be registered according to the provisions of said Act of Congress; whereupon, on motion of Isidore B. Dockweiler, Esq., of counsel for defendant, it is ordered that defendant be, and hereby is, granted ten days stay of execution of judgment herein, defendant in the meantime to remain at large on his present bail bond.

Said defendant now presents and serves this, his bill of exceptions, and asks that same be settled and allowed and duly certified as such.

ISIDORE B. DOCKWEILER,

Attorney for Said Defendant Edward H. Phelan.

Received copy of the foregoing bill of exceptions, this 1st day of November, 1917, and within the time allowed by law, and all orders extending the time therefor.

ROBERT O'CONNOR,
United States Attorney.
By CLYDE R. MOODY,
Assistant United States Attorney.

It is hereby stipulated that the foregoing shall constitute the bill of exceptions of and in the above entitled cause, and that the same may be settled, allowed and ordered to be filed herein by the Honorable Oscar A. Trippet, who is the judge who tried the said cause, or, by reason of his absence from the state of California, by the Honorable Benjamin F. Bledsoe, United States district judge; and no objection shall at any time hereafter be made or urged because said bill has been signed, settled, allowed or ordered to be filed herein by said Honorable Benjamin F. Bledsoe, judge aforesaid, and in case any objection shall hereafter be made upon any of the aforesaid grounds, or otherwise or at all, then said bill of exceptions shall be settled, allowed and ordered to be filed herein by the said Honorable Oscar A. Trippet, district judge as aforesaid, whenever required so to do by counsel representing defendant.

Dated November 10th, 1917.

ROBERT O'CONNOR,

United States Attorney,

CLYDE R. MOODY,

Assistant United States Attorney,

Attorneys for Plaintiff.

ISIDORE B. DOCKWEILER,

Attorney for Defendant.

# Order Settling Bill of Exceptions.

And now, in pursuance of justice and that right may be done, the defendant Edward H. Phelan tenders and presents the foregoing bill of exceptions, containing all of the evidence offered and introduced at the trial of said cause, and the instructions requested by the defendant to be given to the jury, with the defendant's exceptions, the refusal of the court to give each and every one of the same, and the instructions of the court to the jury, and containing all of the proceedings on the trial of said cause, to and including the verdict of the jury and the proceedings on defendant's motion for a new trial, and containing all of the exceptions taken by said defendant throughout said trial, and prays that same may be settled, allowed and signed and sealed by the court and made a part of the record, and the same is hereby accordingly done, and said bill of exceptions is hereby ordered to be filed this 17th day of November, 1917.

BENJAMIN F. BLEDSOE,

United States District Judge in and for the Southern District of California, Southern Division.

[Endorsed]: Original. No. 1299 Criminal. Dept. . . . . . In the District Court of the United States, for the Southern District of California, Southern Division. The United States of America, plaintiff, vs. Edward H. Phelan, defendant. Bill of Exceptions on Behalf of Defendant Edward H. Phelan. Filed Nov. 17, 1917. Wm. M. Van Dyke, clerk; Chas. N. Williams, deputy. Isidore B. Dockweiler, suite 502 Douglas Bldg., office Tel., Main 1320 (Sunset), Home 1320, Los Angeles, Cal., attorney for defendant. Removed to 1035 I. N. Van Nuys Bldg.

In the District Court of the United States, for the Southern District of California, Southern Division.

No. 1299 Criminal.

UNITED STATES OF AMERICA,

Plaintiff,

VS.

EDWARD H. PHELAN,

Defendant.

### Petition for Writ of Error.

Your petitioner, Edward H. Phelan, defendant in the above entitled cause, brings this petition for writ of error to the District Court of the United States, in and for the Southern District of California, Southern Division, and in that behalf, your petitioner says:

That on the 19th day of October, 1917, the jury in the above entitled cause found your petitioner. Edward H. Phelan, guilty as charged in the indictment, and that thereafter and on the 22nd day of October, 1917, there was made, given, rendered and entered in the

above entitled court and cause, judgment against your petitioner, wherein and whereby your petitioner Edward H. Phelan was sentenced to be imprisoned for twelve months in the county iail of the county of Los Angeles, and that he thereupon be registered according to the provisions of the act of Congress adopted and enacted May 18th, 1917; and your petitioner says that he is advised by counsel and he avers that there was and is manifest error in the records and proceedings had in such cause and in the making, giving and rendering of such judgment and sentence to the great injury and damage of your petitioner, all of which errors will be more fully made to appear by the examination of the said records, and by examination of the bill of exceptions by your petitioner to be rendered and filed and in the assignment of errors hereinafter set out and to that end thereafter that the said judgment, sentence and proceedings may be reviewed by the United States Circuit Court of Appeals. Ninth Circuit, your petitioner now prays that a writ of error may be issued, directed therefrom to the said District Court of the United States for the Southern District of California, Southern Division, returnable according to law and the practice of the court and that there may be directed to be returned pursuant thereto a true copy of the record, bill of exceptions, assignment of errors and all proceedings had in said cause that the same may be removed into the United States Circuit Court of Appeals for the Ninth Circuit, to the end that the error, if any has happened, may be duly corrected and full and speedy justice done your petitioner

And your petitioner now makes the assignment of errors filed herewith upon which he will rely and which will be made to appear by return of said record in obedience to said writ.

Wherefore, your petitioner prays the issuance of the writ as herein prayed, and prays that the assignment of errors filed herewith may be considered as his assignment of errors upon the writ, and that the judgment rendered in this cause may be reversed and held for naught and that said cause be remanded for further proceedings and that he be awarded a supersedeas upon said judgment and all necessary processes, including bail.

### EDWARD H. PHELAN,

Petitioner.

# ISIDORE B. DOCKWEILER,

Attorney for Said Petitioner Edward H. Phelan.

[Endorsed]: Original. No. 1299 Criminal. Dept. . . . . . In the District Court of the United States for the Southern District of California, Southern Division. United States of America, plaintiff, vs. Edward H. Phelan, defendant. Service of the within petition for writ of error is hereby admitted this second day of November, 1917. Gordon Lawson, asst. U. S. attorney, attorneys for plaintiff. Filed Nov. 2, 1917. Wm. M. Van Dyke, clerk; by Chas. N. Williams, deputy clerk. Isidore B. Dockweiler, suit 536 Douglas Bldg., office tel., Main 8756, Home 1320, Los Angeles, Cal., attorney for defendant. Removed to 1035 I. N. Van Nuys Bldg.

In the District Court of the United States, for the Southern District of California, Southern Division.

No. 1299 Criminal.

UNITED STATES OF AMERICA,

Plaintiff,

VS.

EDWARD H. PHELAN,

Defendant.

# Assignment of Errors.

Edward H. Phelan, defendant in the above entitled cause and plaintiff in error herein, having petitioned for an order from said court permitting him to procure a writ of error from the Circuit Court of Appeals, Ninth Circuit, directed to the District Court of the United States for the Southern District of California, Southern Division, from the judgment and sentence made and entered in said cause against said plaintiff in error, and petitioner herein now makes and files with his said petition the following assignment of errors herein, which he avers occurred on the trial of said cause and upon which he will rely for a reversal of said judgment and sentence upon the said writ, and which said errors, and each and every one of them, are to the great detriment, injury and prejudice of the said defendant and in violation of the of the rights conferred upon him by law; and he says that in the records and proceedings in the above entitled cause upon the hearing and determination thereof in the District Court of the United States for the Southern District of California, Southern Division, there is manifest error in this, to-wit:

I.

The court erred in allowing Father Patrick Harnett to answer the following questions propounded by Mr. Lawson and the court, on behalf of the plaintiff, over and against defendant's objections, and in refusing to sustain defendant's objections to each of them, to which action of the court defendant duly excepted:

(a)

Q. What are the facts that the priest is required to record?

Mr. Dockweiler: I want to object to the question upon the ground it is incompetent, irrelevant and immaterial.

The Court: The objection will be overruled.

Mr. Dockweiler: Exception.

The Court: Read the statement.

(Last statement read by the reporter as follows: "He is obliged to record the date of the baptism, the name of the child baptized, the names of the parents of the child—")

The Witness (continuing): The date of birth, the date of birth of the child, and the names of the sponsors.

(b)

Q. By the Court: Now what date was the child baptized?

Mr. Dockweiler: Now, just one minute. Now, pardon me, Your Honor, I want to get in an objection. We object to that question upon the ground that the same is incompetent, irrelevant and immaterial. As the defendant contends, it is wholly immaterial to

the issues in this case as to when the defendant was baptized in the Roman Catholic church.

The Court: The objection will be overruled.

Mr. Dockweiler: Exception.

The Court: Answer the question, Father Harnett.

A. I baptized the child on the 8th of August, 1886.

Q. By the Court: Where?

Mr. Dockweiler: The same objection. The same ruling, I assume?

The Witness: I am not quite certain as to where the child was baptized, but I assume it was baptized in Los Nietos.

(d)

Q. By Mr. Lawson: What is the teaching, Father Harnett, in the Catholic church in regard to infants dying before baptism?

Mr. Dockweiler: We object to that as incompetent, irrelevant and immaterial.

The Court: The objection will be overruled.

Mr. Dockweiler: Exception.

A. The teaching of the Catholic church with regard to the death, or with regard to the salvation of infants who die without baptism is that no one, no child who is unbaptized and dies before it attains the use of reason can enter into the Kingdom of Heaven.

(e)

Q. Was there a practice in your church that was known to these parents, concerning when the children should be baptized?

Mr. Dockweiler: Now, we object to that question upon the ground that it is incompetent, irrelevant and

immaterial, and upon the ground that it assumes that the Monsignor knew what was in the minds of the parents of the child.

The Court: I will overrule the objection.

Mr. Dockweiler: Exception.

A. I don't know.

#### II.

The court erred in allowing Father Patrick Harnett to testify on behalf of the plaintiff, over and against defendant's objections and refusing to sustain defendant's objections to questions propounded to him when being questioned as to the date he baptized the defendant and as to the teachings of the Catholic church, in regard to infants dying before baptism, and also concerning when children should be baptized, to which action of the court defendant duly excepted.

# III.

The court erred in refusing to grant the motion of the defendant to strike out the answer of the witness Haribet J. Rechsteiner to the following questions propounded to him on behalf of the plaintiff, when testifying in reference to United States Exhibit No. 1, and in refusing to sustain the defendant's objections thereto, to which action of the court defendant duly excepted. (a)

Q. Do you remember whether or not he stated at that time he signed this application?

A. Yes.

(b)

Q. He admitted signing it, did he?

A. He admitted signing it; yes, sir.

Mr. Dockweiler. I move to strike out the answer with a view to enabling me to note an objection.

The Court: You can move to have it stricken out on the ground that you object to the question.

Mr. Dockweiler: I object to the question upon the ground that the same is incompetent, irrelevant and immaterial

The Court: The objection will be overruled. The motion is denied.

Mr. Dockweiler: I note an exception. 1.

#### IV

The court erred in allowing the witness Mrs. Mary Isbell, called on behalf of the plaintiff, to testify in response to questions propounded on behalf of the plaintiff, over and against the defendant's objections, as to whether or not Mrs. Phelan was confined with the defendant, at the same time she was confined with her daughter, Rexie Dale, and as to what she thought concerning whether her daughter, Rexie Dale, was older than the defendant, to which action of the court defendant duly excepted.

# $\mathbf{V}$

The court erred in allowing the witness Mrs. Mary Isbell to answer the following questions, propounded to the witness Mrs. Isbell by Mr. Lawson on behalf of the plaintiff, over and against the defendant's objections, to which action of the court defendant duly excepted:

(a)

O. Mrs. Isbell, do you know whether or not Mrs. Phelan was confined at about the same time you were confined with your daughter, Rexie Dale?

Mr. Dockweiler: One moment. We object to that question as leading and suggestive; incompetent, irrelevant and immaterial.

The Court: The objection will be overruled.

Mr. Dockweiler: Exception.

A. I said that I didn't remember.

(b)

Q. Do you know, Mrs. Isbell, whether or not at the time you were confined with your daughter, Rexie Dale, whether at that time or after—whether the defendant was born after that time, when you were confined with your daughter, Rexie Dale?

Mr. Dockweiler: We object to the question.

A. I couldn't say.

(c)

Q. But just according to your best recollection. Do you remember whether or not at that time Mrs. Phelan was confined with the defendant at the same time when you were confined with your daughter, Rexie Dale?

Mr. Dockweiler: We object to that question upon the ground that the question has already been put and answered.

The Court: The answer was stricken out. I will overrule it.

Mr. Dockweiler: Well, no, the second one was not. The Court: Answer the question.

Q. By Mr. Lawson: According to your best recollection?

A. Well, I declare I couldn't say, because I don't know.

(d)

Q. Well, what is your memory of that occurrence? Mr. Dockweiler: We object to that upon the ground that the same is incompetent, irrelevant and immaterial, and it has already been testified to by the witness that she did not know.

The Court: The objection will be overruled. Read the question to the witness.

Mr. Dockweiler: Exception.

A. Well, I thought mine was the oldest. Of course, I couldn't say positively.

### VI.

The court erred in allowing the witness Susie Daven to answer the following questions propounded to her by Mr. Lawson, on behalf of the plaintiff, over and against the defendant's objection, and in refusing to sustain the defendant's objection thereto, to which action of the court defendant duly excepted:

(a)

Q. When you were on the ranch, at that time, just before you left this year, did you or did you not hear the defendant make any statement as to whether or not he would register?

Mr. Dockweiler: We object to that upon the ground that the same is incompetent, irrelevant and immaterial.

The Court: The objection is overruled.

Mr. Dockweiler: I note an exception.

Mr. Dockweiler: We do not deny that we did not register, Your Honor.

The Witness: He said he would not register because he was not going to be killed for any other nation, and he would disguise himself and go out into the mountains, either of Arizona or Nevada.

#### VII.

The court erred in allowing the witness Frank Daven to answer the following question propounded by Mr. Lawson on behalf of the plaintiff, and in refusing to sustain defendant's objection thereto; to which action of the court defendant duly excepted:

Q. Now, what did the defendant say at that time? Mr. Dockweiler: We object to that question upon the ground it is incompetent, irrelevant and immaterial.

The Court: Objection overruled.

Mr. Dockweiler: Exception.

A. Mr. Phelan says—he says he never got to register; he don't want to get killed going to fight for France and England—

The Court: Just a minute. The reporter can't understand you. Start again.

A. Mr. Phelan says he don't want to get to register because he don't want to get killed for France and England.

The Court: Now, start in here and go slower.

A. He says he don't want to get killed for France and England, and then go to war. He let his whiskers grow and get away up in the mountains, up in Nevada some place, and the board couldn't find him.

### VIII.

The court erred in allowing the witness Susie Daven to testify over and against the defendant's objection, in regard to the alleged conversation that took place at her home on the Phelan ranch in the early part of May, 1916, between the defendant and herself,

husband and daughter, and also in allowing her to testify as to what the defendant said on said occasion, to which action of the court defendant duly excepted.

#### IX.

The court erred in allowing the witness Frank Daven to testify in response to questions propounded on behalf of plaintiff, over and against defendant's objections, as to the alleged conversation that took place at his home on the Phelan ranch on the first Sunday in May, between the defendant, the witness and his wife and daughter, or any of them, and also in allowing the witness to state what the defendant said on that occasion.

### X.

The court erred in sustaining the objection made by Mr. Lawson, on behalf of the plaintiff, to the following questions propounded to the witness Frank Daven by Mr. Dockweiler on cross-examination, and in refusing to allow said witness to answer each and all of said questions, to which action of the court defendant duly excepted.

(a)

- Q. By Mr. Dockweiler: Isn't it a fact that your wife became quite unfriendly to the defendant Phelan, because of some advice Mr. Phelan gave to you, and some assistance he gave to you immediately following the departure of your wife from the ranch?

  (b)
- Q. By Mr. Dockweiler: Did your wife ever express to you any feeling of hostility regarding Edward Phelan because of some assistance that Edward Phelan

rendered you, following the departure of your wife from the ranch?

(c)

Q. By Mr. Dockweiler: About the time that you left the ranch, did you have any conversation with the defendant Edward Phelan—respecting your wife and her departure?

(d)

(e)

- Q. By Mr. Dockweiler: Did he ever do anything to you to make you feel unkindly toward him?
- Q. By Mr. Dockweiler: Well, what did Dan do around there?

(f)

Q. By Mr. Dockweiler: Did Dan ever come around and talk to you, his brother?

(g)

Q. By Mr. Dockweiler: Did Peterson come around and talk to you while there?

(h)

Q. By Mr. Dockweiler: Did Edna ever talk to you on the ranch at any time while you were employed there?

(i)

Q. By Mr. Dockweiler: What, if anything, did Edna Phelan tell you about this case?

### XI.

The court erred in sustaining plaintiff's objection to the following questions propounded to the defendant by Mr. Dockweiler, and in refusing to allow said defendant to answer each and every one of said ques-

tions while testifying in his own behalf, to which action of the court defendant duly excepted:

- Q. By Mr. Dockweiler: Mr. Phelan, with reference to the Davens, what, if anything, occurred near or about the first part of May in connection with Mrs. Daven and your relationship with Mrs. Daven in reference thereto?
- Q. By Mr. Dockweiler: Mr. Phelan, was there any other instance in your family of a brother for years observing a birthday in one month erroneously?

(b)

The court erred in refusing to allow the defendant Edward Henry Phelan to testify and give evidence tending to show that the relations between the defendant and the witnesses Mrs. and Mr. Daven were unfriendly, and also in refusing to allow the defendant to testify and give evidence that his brother, John Joseph Phelan, for five years regarded and observed July 22nd as his birthday, when, as a matter of fact, years afterward it was discovered or ascertained that June 22nd was his birthday, to which action of the court defendant duly excepted.

# XIII.

The court erred in sustaining the plaintiff's objection to each and every one of the following questions propounded to the witness Mary Phelan by Mr. Dockweiler and also in refusing to allow her to answer each and everyone of said questions, to which action of the court defendant duly excepted:

(a)

- Q. Do you know whether John Joseph Phelan had for any period of time regarded July 22nd as his birthday—instead of his real birthday, June 22nd?
  (b)
- Q. Do you know whether your son, John Joseph Phelan, for any period of time had mistakenly regarded a certain day as a birthday?

#### XIV.

The court erred in allowing Claya Taylor, called on hehalf of the plaintiff, to answer the following questions propounded to her in reference to a carbon copy of a telegram, and in reference to a letter, over and against defendant's objections, and in refusing to sustain defendant's objections to said questions; and each of said questions, to which action of the court defendant duly excepted:

(a)

Q. Can you identify that telegram, Miss Taylor, as having been sent from the office of the United States attorney?

Mr. Dockweiler: We object to that question upon the ground that it is incompetent, irrelevant and immaterial.

The Court: The objection will be overruled.

Mr. Dockweiler: No foundation laid for it. Exception.

A. I recognize it as a carbon copy of a telegram sent from the office.

(b)

Q. Can you identify this letter, Miss Taylor, as

having been received in the office of the United States attorney?

Mr. Dockweiler: Yes. We object to that question on the ground that the same is incompetent, irrelevant and immaterial.

The Court: The objection will be overruled.

Mr. Dockweiler: And leading and suggestive.

The Court: Overruled. Now, you may answer the question.

A. I do recognize it; yes.

### XV.

The court erred in overruling the objections made by Mr. Dockweiler, on behalf of the defendant, to the following questions propounded to the witness Mary Phelan while on cross-examination, while being questioned in reference to United States Exhibits Nos. 3 and 4, and also in allowing her to answer said questions, and each of them, over defendant's objections, to which action of the court defendant duly excepted:

(a)

The Court: Well, you may ask her if it is a photographic copy of her handwriting?

Q. By Mr. Lawson: Is that a photographic copy of your handwriting?

A. I don't remember—

Mr. Dockweiler: Now, Mrs. Phelan, one minute. We object to the question as incompetent, irrelevant and immaterial and not proper cross-examination, and assumes a fact not proven.

The Court: The objection will be overruled.

Mr. Dockweiler: Exception.

(b)

Q. By Mr. Lawson: Is that your handwriting?

A. I don't remember; I don't remember whether I wrote it.

The Court: That was not the question I gave your leave to ask,

(c)

Q. By Mr. Lawson: Is that a photographic copy of your handwriting?

A. I can't remember.

Mr. Dockweiler: One minute now. I renew my objection.

The Court: Well, the objection will be overruled to that.

Mr. Dockweiler: Exception.

### XVI.

The court erred in admitting in evidence over and against the defendant's objection plaintiff's exhibits marked respectively United States Exhibits Nos. 1, 3, 4, 5, and 6, and each of said exhibits, to which action of the court defendant duly excepted; said Exhibit I being an application by defendant for associate membership in the order of the Knights of Columbus, which application contains a statement as to the date of defendant's birth; said Exhibit 3 being a deposition of Mary Phelan in case No. 411751, taken in connection with an application by said Mary Phelan for a pension, which deposition contains a statement as to the name and date of birth of defendant; said Exhibit 4 being three affidavits made by Mary Phelan, mother of defendant, in connection with three separate applications for a pension, each of which said affidavits

contains a statement as to the name and date of the birth of defendant; said exhibit also containing an affidavit of Mary Phelan and one Joaquin Bot, which affidavit contains a statement as to the name and date of birth of defendant; said Exhibit 5 being a telegram reading as follows:

"Western Union Telegram. Charge Government rate. Los Angeles, California. 10-9-17.

Attorney General,

Washington, D. C.

Send to special examiner Uline Los Angeles original papers proving age and birth Edward Phelan in pension application by Mary Phelan include any other evidence in pension files papers identified telegram October 9th from Saltzgiber trial October sixteenth. Rush.

O'CONNOR, U. S. Atty."

and Exhibit 6 being a letter reading as follows:

"DEPARTMENT OF JUSTICE, RLD-LP BUREAU OF INVESTIGATION,

Washington, October 10, 1917.

"John R. O'Connor, Esquire,

Assistant United States Attorney, Los Angeles, California.

Dear Sir:

Referring to your telegram to me of today, I enclose herewith copy of the baptismal and death record of the Cathedral of St. Vibiana, relative to the baptism of Edward Henry Phelan, copy of a deposition made by Mary Phelan on November 10, 1909, in connection with her claim for pension as widow of Thomas Phelan, and copy of three applications for pension

made October 12, 1889, August 15, 1890, and May 12, 1908, by Mary Phelan, certified under the Act of August 24, 1912, 37 Statutes at Large, page 498, section 3.

The commissioner of pensions considered it impracticable to send the original papers. I believe, however, that the certified copies will serve your purpose equally well.

Very truly yours,

A. B. BIELASKI,

Chief."

(Enclosures) RLD"

#### XVII.

The court erred in allowing to be read in evidence, over defendant's objection, United States Exhibits Nos. 1, 3, 4, 5 and 6, and each of said exhibits, and also each, any and every part of each exhibit, to which action of the court defendant duly excepted.

## XVIII.

The court erred in refusing to instruct the jury, as requested by defendant, as follows, to-wit:

"You are instructed that you cannot presume, conjecture, guess or arrive at any conclusion as to the age of the defendant Edward H. Phelan from the mere fact that he was baptized on the 8th day of August, 1886." To which refusal of the court the defendant duly excepted.

## XIX.

The court erred in refusing to instruct the jury, as requested by defendant, as follows, to-wit:

"You are instructed that the law presumes the defendant innocent of the crime charged in the indict-

ment and innocent of any crime whatsoever, and you are instructed that the presumption of innocence follows him throughout the trial in this case, and in your deliberations as to the guilt or innocence of this defendant, you must take into consideration said presumption of innocence as a matter of evidence." To which refusal of the court the defendant duly excepted.

#### XX.

The court erred in refusing to instruct the jury, as requested by defendant, as follows, to-wit:

"You are instructed that on June 4th, 1886, and at the time Thomas Phelan executed the declaration of homestead on the property near Whittier, where he was then residing, the law of the state of California did not require that he insert in such declaration of homestead the names of his children, the number of his children, or the ages of his children." To which refusal of the court the defendant duly excepted.

# XXI.

The court erred in refusing to instruct the jury, as requested by defendant, as follows, to-wit:

"You are instructed that the law of the state of California has at no time required one declaring a homestead on property to insert in the declaration of homestead the names, ages or number of his children, or the dates of their birth." To which refusal of the court the defendant duly excepted.

# XXII.

The court erred in refusing to instruct the jury, as requested by defendant, as follows, to-wit:

"The court instructs the jury that the law did not require a declaration of homestead to set forth the number of children, or their ages, possessed by the party making such declaration of homestead." To which refusal of the court the defendant duly excepted.

### XXIII.

The court erred in refusing to instruct the jury, as requested by defendant, as follows, to-wit:

"The law in a criminal case clothes the defendant with the presumption of innocence, and when proof tends to overthrow this presumption, and to fix upon the defendant the presumption of guilt, the latter is permitted to support the original presumption of innocence by proof of good character. Such good character. when proven, is a circumstance tending in a greater or lesser degree to establish his innocence. It is of value not only in doubtful cases, but also when the testimony tends very strongly to establish the guilt of the accused. When proven, it is a fact in the case, and it is not to be put aside by the jury in order to ascertain that the other facts and circumstances considered in themselves do not establish the defendant's guilt beyond a reasonable doubt, but such good character, if proven, should be considered by the jury in connection with all of the testimony in the case, and not independently thereof, and the guilt or innocence of the defendant determined from all the testimony in the case, and such good character, if proven, should be weighed as any other fact established, and may, if proven, in itself be sufficient to raise a reasonable doubt as to the defendant's guilt in the minds of the jury." To which refusal of the court the defendant duly excepted.

### XXIV.

The court erred in refusing to instruct the jury, as requested by defendant, as follows, to-wit:

"The law in a criminal case clothes the defendant with the presumption of innocence, and when proof tends to overthrow this presumption, and to fix upon the defendant the presumption of guilt the latter is permitted to support the original presumption of innocence by proof of good character. Such good character, when proven, is a circumstance tending in a greater or lesser degree to establish his innocence. It is of value not only in doubtful cases, but also when the testimony tends very strongly to establish the guilt of the accused. When proven, it is a fact in the case, and it is not to be put aside by the jury in order to ascertain that the other facts and circumstances considered in themselves do not establish the defendant's guilt beyond a reasonable doubt, but such good character, if proven, should be considered by the jury in connection with all of the testimony in the case, and not independently thereof and the guilt or innocence of the defendant determined from all the testimony in the case, and such good character, if proven, should be weighed as any other fact established, and may, if proven, in itself be sufficient to raise a reasonable doubt as to the defendant's guilt in the minds of the jury. If the jury find the evidence conflicting and doubtful as to the defendant's guilt, the importance which the jury are authorized to give to the evidence of good character is thereby increased.

In connection with what I have said on this subject, you are further instructed that the evidence in this

case stands undisputed that the defendant is a person of good character and enjoys a reputation in the community where he lives for truth, honesty and veracity. In addition to the evidence offered upon the subject, it was conceded by the counsel for the Government that he is a person of good moral character and enjoys a good reputation in the community where he lives for truth, honesty and veracity." To which refusal of the court the defendant duly excepted.

#### XXV.

The court erred in refusing to instruct the jury, as requested by defendant, as follows, to-wit:

"You are instructed that if the defendant was over the age of 31 years on June 5th, 1917, or if he had reason to believe and did believe that he was over the age of 31 years on the said 5th day of June, 1917, you must acquit him." To which refusal of the court the defendant duly excepted.

## XXVI.

The court erred in refusing to instruct the jury, as requested by defendant, as follows, to-wit:

"You cannot convict the defendant of the crime charged in the indictment if you believe from the evidence that he had reason to believe or did believe that he was not required to present himself for and submit to registration under and pursuant to the Act of Congress of May 18th, 1917." To which refusal of the court the defendant duly excepted.

## XXVII.

The court erred in refusing to instruct the jury, as requested by defendant, as follows, to-wit:

"You are instructed that the indictment charges, in

substance, that Edward H. Phelan, being a person between the ages of twenty-one and thirty, to-wit, a person who had attained his twenty-first birthday and who had not attained his thirty-first birthday on the 5th day of June, 1917, and being a person required to register under and pursuant to the act of Congress approved May 18th, 1917, entitled "An Act to Authorize the President to Increase Temporarily the Military Establishment of the United States," unlawfully did wilfully fail and refuse to present himself at the registration place in Los Nietos precinct. Los Angeles county, between 7 a. m. and 9 p. m. on said 5th day of June, 1917, and to submit himself for registration as in said act provided; and in this respect I charge you that before you can convict the defendant of wilfully failing to present himself and submit to registration pursuant to said act of Congress, you must believe from the evidence beyond a reasonable doubt that the said defendant Edward H. Phelan had not attained his thirty-first birthday on the 5th day of June, 1917, and that he knew said fact and fully understood said fact, and that, knowing and understanding that he had not attained his thirty-first birthday, and knowing and understanding that he was required to register pursuant to said act of Congress, that he did wilfully fail and refuse to present himself for and submit to registration as provided by said act of Congress.

If, on the other hand, you believe from the evidence that the said Edward H. Phelan believed or had reason to believe that he had attained his thirty-first birthday on the said 5th day of June, 1917, and that he did not understand and believe that he was required to

register under and pursuant to said act of Congress on the said 5th day of June, 1917, then you must acquit him." To which refusal of the court the defendant duly excepted.

#### XXVIII.

The court erred in refusing to instruct the jury, as requested by defendant, as follows, to-wit:

"If you believe from the evidence that the defendant, on and throughout the 5th day of June, 1917, had reason to believe and did believe that he arrived at the age of 31 years of age on the 13th day of March, 1917, and that he had reason to believe and did actually believe, on and throughout the 5th day of June, 1917, that he was over 31 years of age, then I instruct you that you must acquit him." To which refusal of the court the defendant duly excepted.

#### XXIX.

The court erred in refusing to instruct the jury, as requested by defendant, as follows, to-wit:

"I instruct you that the law presumes that the defendant in this case is innocent of the crime charged in the indictment, and that that presumption follows him throughout the trial, and in determining the innocence or guilt of defendant it is your duty to take into consideration the presumption of his innocence as a matter of evidence." To which refusal of the court the defendant duly excepted.

# XXX.

The court erred in refusing to instruct the jury, as requested by defendant, as follows, to-wit:

"The fact that the defendant in this case has been indicted and crimes charged against him does not

raise any presumption in any way or manner whatsoever that he is guilty of the crime charged, or of any crime whatsoever, and in that regard you are instructed that the law presumes that the defendant is innocent of the crime charged in the indictment, and that said presumption follows him throughout the trial of this case." To which refusal of the court the defendant duly excepted.

#### XXXI.

The court erred in refusing to instruct the jury, as requested by defendant, as follows, to-wit:

"It is incumbent upon the Government to prove beyond a reasonable doubt that the defendant is guilty of the crime charged in the indictment, and if after you have weighed the evidence there is a reasonable doubt in your minds as to the guilt of the defendant, it is your duty to acquit him." To which refusal of the court the defendant duly excepted.

## XXXII.

The court erred in refusing to instruct the jury, as requested by defendant, as follows, to-wit:

"If, after weighing and considering the evidence according to the rules given you by the court for your guidance, there is any reasonable doubt in your minds as to whether the defendant is guilty or innocent of the crime charged in the indictment, it is your duty to render a verdict acquitting him of said crime." To which refusal of the court the defendant duly excepted.

# XXXIII.

The court erred in refusing to instruct the jury, as requested by defendant, as follows, to-wit:

"You cannot convict the defendant of the crime

charged in the indictment unless you are convinced by the evidence beyond a reasonable doubt that he is guilty of such crime." To which refusal of the court the defendant duly excepted.

#### XXXIV.

The court erred in refusing to instruct the jury, as requested by defendant, as follows, to-wit:

"You are not bound to decide in conformity with the declarations of any number of witnesses which do not produce conviction upon your minds against a less number or against a presumption or other evidence satisfying to your minds; and in this connection I instruct you that a witness false in one part of his or her testimony is to be distrusted in others." To which refusal of the court the defendant duly excepted.

#### XXXV.

The court erred in refusing to instruct the jury, as requested by defendant, as follows, to-wit:

"You are instructed that in determining the weight to be given to the testimony of a witness, you will take into consideration the intelligence of the witness, the witness' bias or prejudice, if any, his or her manner on the witness stand, his or her apparent fairness or want of fairness, his or her means of observation and knowledge, and all matters, facts and circumstances shown on the trial, including any evidence offered tending to impeach the reputation of the witness for truth and veracity in the neighborhood where he or she resides, bearing upon the question of the weight to be given to his or her testimony; and give to the testimony of each and every witness such weight as to you it may

seem fairly entitled to." To which refusal of the court the defendant duly excepted.

#### XXXVI.

The court erred in refusing to instruct the jury, as requested by defendant, as follows, to-wit:

"You are the sole judges of the weight of the evidence and the credibility of the witnesses, and in determining the same you may consider the interest, bias or prejudice of a witness, if any, and manner in which the witness testifies on the stand, his or her apparent fairness or want of fairness, his or her means of observation and knowledge, and all matters, facts and circumstances shown on the trial bearing upon the question of the weight to be given to his or her testimony." To which refusal of the court the defendant duly excepted.

### XXXVII.

The court erred in refusing to instruct the jury, as requested by defendant, as follows, to-wit:

"You are instructed that the indictment in this case charges that Edward H. Phelan on June 5th, 1917, was a male person between the ages of twenty-one and thirty; and in this respect I charge you that the undisputed evidence in this case shows that Edward H. Phelan was not a person between the ages of twenty-one and thirty on June 5th, 1917, but that he was over thirty years of age on June 5th, 1917, and you are therefore instructed and directed to return a verdict acquitting the defendant of the crime charged in the indictment." To which refusal of the court the defendant duly excepted.

#### XXXVIII.

The court erred in refusing to instruct the jury, as requested by defendant, as follows, to-wit:

"You are instructed that the Government has wholly failed to prove that the defendant is guilty of the crime charged in the indictment, and you are therefore instructed to return a verdict acquitting him." To which refusal of the court the defendant duly excepted.

#### XXXIX.

The court erred in refusing to instruct the jury, as requested by defendant, as follows, to-wit:

"You are instructed to return a verdict acquitting the defendant." To which refusal of the court the defendant duly excepted.

# XL.

The court erred in refusing to instruct the jury, as requested by defendant, as follows, to-wit:

"Before the defendant can be convicted of the crime charged in the indictment you must be satisfied from the evidence beyond a reasonable doubt that the said defendant did on the 5th day of June, 1917, know that he was over the age of 31 years of age and that knowing said fact that he wilfully failed to register; therefore if you believe from the evidence that he did on said day have reason to believe and did believe that he was over the age of 31 years, or if you believe from the evidence that he was over the age of 31 years, then you must acquit him." To which refusal of the court the defendant duly excepted.

۲,3

#### XLI.

The court erred in refusing to instruct the jury, as requested by defendant, as follows, to-wit:

"Before you can convict the defendant of the crime charged in the indictment you must not only believe that he had not attained the age of 31 years on the 5th day of June, 1917, but you must also believe from the evidence beyond a reasonable doubt that the said defendant on the said 5th day of June, 1917, knew or believed that he had not attained the age of 31 years, and that knowing said fact that he wilfully failed to register for military service and to submit to registration as required by law." To which refusal of the court the defendant duly excepted.

#### XLII.

The court erred in refusing to instruct the jury, as requested by defendant, as follows, to-wit:

"The word "willful" implies an intent and purpose on the part of a person to do an act, and therefore I charge you that before the defendant can be convicted of the crime charged in the indictment, you must believe from the evidence beyond a reasonable doubt that he was a person over the age of twenty-one years and who had not attained his thirty-first birthday on or prior to the 5th day of June, 1917, and that, fully knowing and understanding said facts and fully knowing and understanding that he was required to present himself for and submit to registration at the Los Nietos precinct in Los Angeles county, California, on said 5th day of June, 1917, he did wilfully fail and refuse so to do." To which refusal of the court the defendant duly excepted.

#### XLIII.

The court erred in refusing to instruct the jury, as requested by defendant, as follows, to-wit:

"It is incumbent upon the Government in this case not only to prove beyond a reasonable doubt that the defendant failed to present himself for and to submit to registration under the act of Congress approved May 18, 1917, on June 5th, 1917, but the Government must go further and prove beyond a reasonable doubt that the said defendant, knowing that he had not attained the age of 31 years on the 5th day of June, 1917, and knowing that he was required to submit himself for registration and to register pursuant to said act of Congress at the Los Nietos precinct in Los Angeles county, between 7 a. m. and 9 p. m. on said 5th day of June, 1917, did willfully fail to present himself for and submit to registration on June 5th, 1917." To which refusal of the court the defendant duly excepted.

# XLIV.

That the court erred in failing to direct the jury to return a verdict acquitting the defendant of the crime charged in the indictment.

### XLV.

That the court erred in allowing the case to go to the jury, because the evidence showed that the defendant was not guilty of the crime charged in the indictment, or any crime whatsoever.

# XLVI.

That the court erred in allowing the case to go to the jury, because the plaintiff had wholly failed to prove that the defendant was guilty of the crime charged in the indictment.

#### XLVII.

The plaintiff wholly failed to prove that the defendant was guilty of the crime charged in the indictment.

#### XLVIII.

The plaintiff wholly failed to prove that the defendant was guilty of any crime whatsoever.

#### XLIX.

That the court erred in overruling and denying defendant's motion for a new trial.

#### L.

That the court erred in making, giving and rendering judgment against the defendant on the indictment herein, for the reason that the verdict of the jury is against the law, in that the evidence failed to show that the defendant was guilty of the crime charged in the indictment, or any crime whatsoever.

# LI.

That the court erred in pronouncing sentence against the defendant.

## LII.

That the court erred in making, giving and rendering judgment against the defendant on the indictment herein, for the reason that the verdict of the jury is against the law, in that the evidence conclusively shows that the defendant was over thirty-one years of age on June 5th, 1917, and also in that it was not proven on the trial of said action that the defendant was not an officer or an enlisted man of the regular army, or of the navy, or of the national guard, or of

the naval militia, while in the service of the United States.

# ISIDORE B. DOCKWEILER,

Attorney for Edward H. Phelan, Plaintiff in Error. United States of America, Southern District of California, Southern Division—ss.

I hereby certify that the foregoing assignment of errors is made on behalf of the petitioner for a writ of error herein, and is, in my opinion, well taken, and the same now constitutes the assignment of errors upon the writ prayed for.

# ISIDORE B. DOCKWEILER,

Attorney for Plaintiff in Error.

[Endorsed]: Original. No. 1299 Criminal. Dept. . . In the District Court of the United States for the Southern District of California, Southern Division. United States of America, plaintiff, vs. Edward H. Phelan, defendant. Assignment of Errors. Service of the within assignment of errors is hereby admitted this second day of November, 1917. Gordon Lawson, asst. U. S. attorney, attorneys for plaintiff. Filed Nov. 2, 1917. Wm. M. Van Dyke, clerk; by Chas. N. Williams, deputy clerk. Isidore B. Dockweiler, suite 536 Douglas Bldg., office tel. Main 8756, Home 1320, Los Angeles, Cal., attorney for defendant. Removed to 1035 I. N. Van Nuys Bldg.

In the District Court of the United States for the Southern District of California, Southern Division.

UNITED STATES OF AMERICA,

Plaintiff,

VS.

EDWARD H. PHELAN,

Defendant.

No. 1299, Criminal.

# Order Allowing Writ of Error and Admitting Defendant to Bail.

On this 2nd day of November, 1917, came the defendant, Edward H. Phelan, by his attorney, Isidore B. Dockweiler, and presented to the court his petition heretofore filed herein, praying for the allowance of a writ of error, and assignment of errors, intended to be urged by him, and praying also that a transcript of the records and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and that such other and further proceedings may be had as may be proper in the premises:

On consideration whereof, it is ordered, that said petition be, and the same is hereby allowed and granted and that a writ of error be, and the same is hereby allowed in said cause, and returnable before the said United States Circuit Court of Appeals for the Ninth Judicial Circuit, on the thirty day of November, A. D. 1917, and that a transcript of the record and of all the proceedings and papers on which the judgment was made and entered in this cause shall be made and

transmitted to the United States Circuit Court of Appeals for the Ninth Judicial Circuit and said writ shall operate as a supersedeas and stay of execution.

And it appearing that the United States attorney has no objection, it is further ordered that the defendant Edward H. Phelan be admitted to bail pending said writ of error, in the sum of five thousand and no/100 dollars (\$5,000.00), conditioned as the law directs; and

It is hereby further ordered, that the undertaking now tendered by said defendant be and the same is hereby approved as the undertaking on writ of error herein and also as such bail bond.

Done this 2nd day of November, 1917.

BLEDSOE, District Judge.

[Endorsed]: Original. No. 1299 Criminal. Dept. . . In the District Court of the United States for the Southern District of California, Southern Division. United States of America, plaintiff, vs. Edward H. Phelan, defendant. Order Allowing Writ of Error and Admitting Defendant to Bail. Service of the within order is hereby admitted this second day of November, 1917. Gordon Lawson, asst. U. S. attorney, attorneys for plaintiff. Filed Nov. 2, 1917. Wm. M. Van Dyke, clerk; by Chas. N. Williams, deputy clerk. Isidore B. Dockweiler, suite 536 Douglas Bldg., office tel. Main 8756, Home 1320, Los Angeles, Cal., attorney for defendant. Removed to 1035 I. N. Van Nuys Bldg.

In the District Court of the United States for the Southern District of California, Southern Division.

UNITED STATES OF AMERICA,

Plaintiffs,

VS.

EDWARD H. PHELAN,

Defendant.

No. 1299, Criminal.

Praecipe for Transcript of Record.

To the Clerk of Said Court:

Sir: Please prepare the transcript on record upon writ of error in the above cause, containing the following:

- I. Indictment.
- 2. Bench warrant.
- 3. Arraignment and plea of defendant.
- 4. Record of trial stating each day's proceedings.
- 5. Verdict of the jury.
- 6. Judgment of the court.
- 7. Motion for a new trial.
- 8. Affidavit of R. T. Walters on motion for new trial.
- 9. Order denying the same.
- .10. Clerk's certificate to judgment roll.
  - 11. Petition for writ of error on behalf of defendant.
  - 12. Assignments of error on behalf of defendant.
  - 13. Writ of error.
  - 14. Citation on writ of error.
  - 15. Return thereto.

- 16. Order allowing writ of error and supersedeas.
- 17. Supersedeas bond of the defendant.
- 18. All orders extending time to file bill of exceptions.
- 19. Bill of exceptions.
- 20. Clerk's certificate to transcript of record.
- 21. All opinions of the court, made or rendered in connection with trial of the above matter.
- 22. All other papers and documents required by the Circuit Court of Appeals, Ninth Judicial District.

# ISIDORE B. DOCKWEILER,

Attorney for Defendant.

[Endorsed]: Original. No. 1299 Criminal. Dept. . . In the District Court of the United States for the Southern District of California, Southern Division. United States of America, plaintiff, vs. Edward H. Phelan, defendant. Praecipe for Transcript of Record. Service of the within praecipe is hereby admitted this second day of November, 1917. Gordon Lawson, asst. U. S. attorney, attorneys for plaintiff. Filed Nov. 2, 1917. Wm. M. Van Dyke, clerk; by Chas. N. Williams, deputy clerk. Isidore B. Dockweiler, suite 536 Douglas Bldg., office tel. main 8756, Home 1320, Los Angeles, Cal., attorney for defendant. Removed to 1035 I. N. Van Nuys Bldg.

In the District Court of the United States for the Southern District of California, Southern Division.

UNITED STATES OF AMERICA,

Plaintiff,

VS.

EDWARD H. PHELAN,

Defendant.

No. 1299, Criminal. Supersedeas Bond.

Know all men by these presents: That we, Edward H. Phelan, of the city of Whittier, county of Los Angeles, state of California, as principal, and Mary Phelan of the city of Whittier, county of Los Angeles, state of California, and O. M. Souden, of the city of Los Angeles, county of Los Angeles, state of California, as sureties, are held and firmly bound to the United States of America in the full sum of five thousand dollars (\$5,000.00) lawful money of the United States, to be paid to the United States, and the further sum of three hundred dollars (\$300.00) lawful money of the United States, to be paid to the United States, to which payment well and truly to be made we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally firmly by these presents.

Sealed with our seals and dated this 1st day of November, 1917.

Whereas, lately at the term of the District Court of the United States for the Southern District of California, Southern Division, in the suit pending in the said court between the United States of America,

plaintiff, and Edward H. Phelan, defendant, judgment and sentence was given, made and rendered, and entered against the said Edward H. Phelan, defendant, and the said Edward H. Phelan, is about to apply for a writ of error from the United States Circuit Court of Appeals for the Ninth Circuit to reverse said judgment and sentence, and a citation directed to the United States of America to be and appear in the said United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, pursuant to terms and at or within the time to be fixed in the said citation, which said citation shall be duly issued and served within the time provided by law; now, the condition of the above application is such that if upon the service of such writ and citation as aforesaid, the said Edward H. Phelan shall appear in person or by attorney in the United States Circuit Court of Appeals for the Ninth Circuit on such day or days as may be appointed for the hearing of said cause in the said court and prosecute his writ of error, and if the said Edward H. Phelan shall abide by and obey all orders made by the United States Circuit Court of Appeals for the Ninth Circuit in said cause and shall surrender himself in execution of such judgment and sentence, as said court may direct, if the judgment and sentence against him shall be affirmed; and if he shall appear for trial in the District Court of United States for the Southern District of California, Southern Division, on such day or days as may be appointed for the trial by said District Court, and abide by and obey all orders made by said court, provided judgment and sentence against him shall be reversed by the United States Circuit

Court of Appeals, then this obligation to be void: otherwise to remain in full force, virtue and effect.

EDWARD H. PHELAN,

Principal.

# MARY PHELAN, O. M. SOUDEN.

Sureties.

Southern District of California—ss.

Mary Phelan, being duly sworn, deposes and says: That she is a householder in said district and is worth the sum of five thousand three hundred dollars (\$5,300.00), exclusive of property exempt from execution and over and above all debts and liabilities.

## MARY PHELAN.

Subscribed and sworn to before me this 1st day of November, 1917.

(Seal)

WM. M. VAN DYKE,

Clerk U. S. District Court, Southern District of California.

By CHAS. N. WILLIAMS, Deputy.

Southern District of California—ss.

O. M. Souden, being duly sworn, deposes and says: That he is a householder in said district, and is worth five thousand three hundred dollars (\$5,300.00), exclusive of property exempt from execution and over and above all debts and liabilities.

O. M. SOUDEN.

Subscribed and sworn to before me this 1st day of November, 1917.

(Seal) WM. M. VAN DYKE,

Clerk U. S. District Court, Southern District of California.

By CHAS. N. WILLIAMS, Deputy.

Foregoing bond O. K. Gordon Lawson, asst. U. S. attorney.

The foregoing bond and sufficiency of the sureties thereto is hereby approved.

Dated November 2nd, 1917.

BLEDSOE,

District Judge.

[Endorsed]: Original. No. 1299 Criminal. Dept. . . In the District Court of the United States for the Southern District of California, Southern Division. United States of America, plaintiff, vs. Edward H. Phelan, defendant. Supersedeas Bond. Filed Nov. 2, 1917. Wm. M. Van Dyke, clerk; by Chas. N. Williams, deputy clerk. Isidore B. Dockweiler, suite 502 Douglas Bldg., office tel. Main 1320 (Sunset), Home 1320, Los Angeles, Cal., attorney for defendant. Removed to 1035 I. N. Van Nuys Bldg.





